91-195

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

WHITNEY BENEFITS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JACQUES B. GELIN
JOHN A. BRYSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the mere enactment of Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1260(b)(5), which imposes certain restrictions on the granting of permits for surface mining that would affect alluvial valley floors (AVFs), effected a legislative taking of respondents' interests in coal underlying an alluvial valley floor, even though (1) SMCRA is implemented through a permitting process and respondents had not yet invoked that process; (2) SMCRA affords owners of AVF coal a right to exchange that coal for federal coal of equal value; and (3) the restrictions in Section 510(b)(5) were enacted to further the important public purpose of protecting the sensitive hydrology and essential farming operations on AVFs.

PARTIES TO THE PROCEEDING

The petitioner is the United States. The respondents are Whitney Benefits, Inc., and Peter Kiewit Sons' Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WHITNEY BENEFITS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 926 F.2d 1169. The opinion of the Claims Court (App., *infra*, 22a-74a) is reported at 18 Cl. Ct. 394. The prior opinion of the court of appeals (App., *infra*, 74a-98a) is reported at 752 F.2d 1554.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A timely petition for rehearing was denied on April 2, 1991. App., *infra*, 100a. On June 24, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution and Section 510 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1260, are reproduced in relevant part at App., *infra*, 101a-105a.

STATEMENT

A. The Statutory Scheme

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, establishes a program for the regulation of surface coal mining "to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." § 101(d), 30 U.S.C. 1201(d). The Act rests on findings by Congress that many surface mining operations are highly injurious to important public interests. § 101(c), 30 U.S.C. 1201(c); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277-280 (1981).

SMCRA authorizes the States to adopt programs to regulate surface mining, subject to approval by the Secretary of the Interior. § 503, 30 U.S.C. 1253. Those programs, and the restrictions in SMCRA itself, are implemented through a process of administrative review of applications for permits to conduct specific mining operations. To ensure the effectiveness of this regulatory approach, SMCRA prohibits surface coal mining without "a permit issued * * * pursuant to an approved State program." § 506(a), 30 U.S.C. 1256(a). SMCRA also contains numerous detailed provisions designed to achieve Congress's goals. See generally *Virginia Surface Mining*, 452 U.S. 268-272.[1]

---

[1] See § 507, 30 U.S.C. 1257 (contents of permit applications); § 508, 30 U.S.C. 1258 (contents of reclamation plans that must accompany permit applications); § 509, 30 U.S.C. 1259 (performance bonds to ensure completion of reclamation); § 515, 30 U.S.C. 1265

2. Section 510(b)(5) of the Act, 30 U.S.C. 1260 (b)(5), at issue here, imposes additional restrictions on the granting of permits for mining that would affect alluvial valley floors (AVFs) west of the 100th meridian.[2] Specifically, Section 510(b)(5) requires the applicant to show (and the regulatory authority to find) that the proposed mining would: (A) "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated" (but excluding "undeveloped range lands which are not significant to farming," and "those lands as to which the regulatory authority finds that * * * the farming * * * is of such small acreage as to be of negligible impact on the farm's agricultural production"); and (B) "not materially damage the quantity or quality of water in surface or underground water systems that supply these [AVFs]."[3]

(environmental-protection performance standards that a permit must require the operator to meet); § 522, 30 U.S.C. 1272 (areas that must be designated as unsuitable for surface mining, such as national parks and forests, historical sites, and areas near a cemetery, highway right-of-way, occupied dwelling, public building, school, church, or public park).

[2] The term "alluvial valley floor" means (subject to certain limitations) "the unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities." § 701(1), 30 U.S.C. 1291(1). The deposits on an AVF "are permeable and allow water from the river to subirrigate or flood irrigate the surrounding land," which makes "the fertile surface land surrounding the river ideal for ranching or farming." App., *infra*, 23a n.1.

[3] The AVF provisions were based on studies by the National Academy of Sciences, United States Geological Survey, and others showing both the hydrological fragility of AVFs in the arid and semi-arid areas of the West and the essential role of AVFs in the local agricultural and ranching economies and the agricultural base of the Nation. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 59-60, 116-120 (1977); S. Rep. No. 128, 95th Cong., 1st Sess. 54, 110 (1977). In particular, the House Report observed (at 116) that "in the Powder River Basin of eastern Montana and Wyoming, agricultural and ranching operations which form the basis of the

A proviso to Section 510(b)(5) states that the restrictions it imposes shall not apply to operations which, in the year prior to enactment of SMCRA, either: (I) "produced coal in commercial quantities" and were located within or adjacent to AVFs, or (II) had obtained specific permit approval by the state regulatory authority to mine within the AVF. Paragraph (5) provides, however, that if these requirements cannot be met—

> the Secretary, if he determines that substantial financial and legal commitments were made by an operator prior to January 1, 1977, * * * is authorized * * * to enter into an agreement with that operator pursuant to which the Secretary may * * * convey to the fee holder of any such coal deposits * * * the fee title to other available Federal coal deposits in exchange for the fee title to such deposits * * *.

Finally, paragraph (5) states "the policy of the Congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the [AVF] restrictions." These provisions impose a mandatory duty on the Secretary to carry out an exchange of fee coal that cannot be mined under the AVF restrictions (46 Fed. Reg. 61,400 (1981); *Texaco, Inc.* v. *Andrus*, No. 79-2448 (D.D.C. Aug. 15, 1980)), require the federal coal to be of equal value, and permit a cash payment of up to 25% of the value to ensure equalization (43 U.S.C. 1716(b); 43 C.F.R. 2201.3(a), 2201.5(c)(2), 3436.2-3(e)).

B. The Proceedings in This Case

1. Respondent Whitney Benefits, Inc., is a charitable trust created under the will of Edward A. Whitney in 1928. At that time, Whitney Benefits succeeded to the

---

existing economic system of the region, could not survive without hay production from the naturally subirrigated and flood irrigated meadows located on the [AVFs]."

rights to coal and other minerals underlying 1327 acres of land near Sheridan, Wyoming. That acreage is divided into two non-contiguous tracts, referred to as East Whitney and West Whitney. The Tongue River, an interstate tributary of the Powder River, flows through both tracts. So far as the record shows, no effort was made to develop the Whitney coal until the mid 1970s. In December 1974, respondent Peter Kiewit Sons' Co. (PKS) entered into a lease with Whitney Benefits,[4] and PKS thereafter purchased land overlying some of the coal. App., *infra*, 23a-24a.

After conducting preliminary tests at a cost of $1 million, PKS filed a permit application pursuant to state law with the Wyoming Department of Environmental Quality (DEQ) in March 1976, prior to enactment of SMCRA. PKS sought approval for a surface mine only on East Whitney, which was expected to produce 15 million tons over 17 years. C.A. App. 1784-1785; see App., *infra*, 24a. PKS withdrew its application on August 18, 1976, stating that there had been inadequate public notice. C.A. App. 6247. Although PKS expressed an intent to refile (*ibid.*), it did not submit an application during the ensuing one-year period leading up to SMCRA's enactment on August 3, 1977.

2. Respondents believed that the East and West Whitney tracts were covered by SMCRA's AVF provisions and that the underlying coal therefore could be exchanged for federal coal. They were informed that the Wyoming DEQ first had to review a permit application to determine the

---

[4] The lease allowed PKS five years within which to commence mining operations. C.A. App. 2543. PKS agreed to pay Whitney Benefits $581,798.80 in advance royalties. Operating royalties were set at the higher of 17.5 cents per ton or the rate paid under any federal lease for a mine within 15 miles of the Whitney coal. *Id.* at 2541-2543. The federal rate was set at 12½% upon enactment on August 4, 1976, of the Federal Coal Leasing Amendments, Pub. L. No. 94-377, § 6, 90 Stat. 1087, 30 U.S.C. 207; App., *infra*, 23a n.2.

extent of the AVF and to decide what areas could not be mined. Respondents accordingly filed an application with DEQ in October 1978, again seeking a permit to mine only on East Whitney. App., *infra*, 26a. DEQ denied the application, because it was "incomplete" and failed to contain the "necessary information" to "affirmatively demonstrate" that mining would not interrupt or preclude use of the AVF for farming or affect water quality or quantity. C.A. App. 6362; see *id.* at 6368-6397 (itemizing deficiencies). DEQ also stated that it would certify to the Secretary of the Interior that respondents "may be eligible" for a coal exchange under SMCRA. *Id.* at 6362.[5] In November 1979, respondents signed an indefinite extension of their lease, in which they agreed that if they were precluded from mining Whitney coal and if an exchange was effected, the lease would apply to the new tracts. C.A. App. 2553-2555.

On July 1, 1981, respondents requested the Bureau of Land Management (BLM), which is responsible for land exchanges, to aprove an exchange of both East and West Whitney coal. C.A. App. 6403-6408. BLM notified respondents in September 1982 that it could only find that 322 acres within East Whitney were eligible for an exchange, because that was the extent of DEQ's AVF determination and because the remainder "appears minable" and could not qualify for an exchange unless respondents showed that it was "rendered practically unminable" if the AVF itself could not be mined. *Id.* at 2624.[6] BLM further notified respondents that because

[5] DEQ informed the Secretary the next day that its evaluation revealed that the "majority" of the mine area covered by the application was within the AVF, although it did not address the impact of mining on farming or hydrology. C.A. App. 6399. DEQ vacated its rejection of the application in February 1979, believing that action would facilitate a coal exchange, but DEQ again rejected the application in September 1980. *Id.* at 2600, 6400-6402.

[6] BLM had initially informed respondents, without elaboration, that they qualified for an exchange. C.A. App. 6424.

West Whitney was not included in their 1978 permit application and DEQ therefore had made no AVF determination concerning it, BLM could not decide whether any West Whitney coal qualified for an exchange. *Id.* at 2625.

On January 28, 1983, respondents applied to DEQ for an AVF determination for both East and West Whitney. C.A. App. 6434-6435, 6524.[7] To document the extent of both the AVF and the affected agricultural activity, respondents submitted extensive information obtained from local agencies, aerial photography, field inspections and interviews with landowners and lessees. *Id.* at 2669, 2677, 6524-6527. In a decision rendered May 3, 1983, DEQ found that an AVF "does exist on the mine area, that mining and associated activities would interrupt, discontinue and preclude continued farming operations on the [AVF]," and that "sufficient acreage" would be affected to cause "a significant impact to the farming operations that rely on these lands for productivity." *Id.* at 6530. Accordingly, DEQ concluded that a permit could not be granted to mine within the AVF. *Ibid.* DEQ informed BLM that "[t]his decision functions as a first decision on what is referred to as the West Whitney property and a supplemental decision on the East Whitney property." *Id.* at 6590. DEQ urged BLM to allow an exchange of all Whitney coal because, in its experience, the area outside the AVF did "not constitute an economical mining block." *Ibid.* Less than two months later, BLM concluded that all Whitney coal qualified for an exchange and invited respondents to resume negotiations. *Id.* at 2742.

---

[7] At about the same time, PKS took the position in a January 26, 1983, letter to BLM that SMCRA "mandates an exchange of federal coal" for coal underlying not only the AVF itself, but also adjacent land that is rendered practically unminable by an AVF determination. PKS stated that Whitney coal totaling 24,100,000 tons outside the AVF was "physically" but not "economically" recoverable. C.A. App. 6430-6431.

3. a. While negotiations were underway, respondents filed this action in the Claims Court under the Tucker Act, 28 U.S.C. 1491, on August 3, 1983. They alleged that SMCRA had "taken" the Whitney coal within the meaning of the Fifth Amendment, and they sought compensation plus interest from the date of SMCRA's enactment. C.A. App. 39. In an oral ruling on February 2, 1984, the Claims Court granted the United States' motion to dismiss, holding that SMCRA's coal-exchange provision was a method of determining and paying just compensation and that respondents were required to pursue an exchange before filing a Tucker Act claim. App., *infra*, 27a.

b. In January 1985, the court of appeals reversed and remanded for further proceedings. App., *infra*, 75a-88a. It held that an exchange is optional for the owner of coal underlying an AVF and therefore need not be pursued before the owner files a Tucker Act suit. *Id.* at 79a-80a. The court expressed concern that a statute requiring an owner to accept substitute property, rather than money, as compensation would be of "dubious constitutionality," although it acknowledged that the modern view is that statements that compensation must always be in money are "too sweeping." App., *infra*, 80a (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149-152 (1974), and 3 P. Nichols, *Eminent Domain* § 8.2 (3d ed. 1984)). The court also recognized that substitution rights may sufficiently mitigate the economic impact of a regulatory measure to preclude the finding of a taking. App., *infra*, 81a (citing *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 137 (1978)). Thus, it concluded that while the coal-exchange mechanism is not a *jurisdictional* bar to a Tucker Act suit, it might have "a bearing on whether or when a taking has occurred." App., *infra*, 82a. The court pointed out that respondents had alleged a taking only upon enactment of SMCRA, but that they could amend their complaint to allege a taking at a later date. *Id.* at 83a-84a.

4. While their appeal from the dismissal of the Tucker Act suit was pending, respondents filed an action against the Secretary in the United States District Court for the District of Wyoming to compel a coal exchange under SMCRA. In May 1985, the district court held that BLM had delayed unreasonably in performing an exchange and ordered it to "tender coal equal in value to [respondents'] fee coal." *Whitney Benefits* v. *Hodel*, No. C84-193-K (D. Wyo. May 23, 1985), slip op. 2; see App., *infra*, 28a. In July 1986, BLM tendered a tract known as Ash Creek. C.A. App. 8002-8004.[8] BLM subsequently filed a report with the district court showing that the Ash Creek and Whitney coal were similar in quality and quantity, while noting that both had been of speculative value since 1980 because of the depressed state of the coal market. *Id.* at 8007-8014. Respondents challenged the report, and the government sought to compel respondents to either accept or reject the tender. However, the district court stayed all proceedings in August 1987, pending the outcome of this Tucker Act suit. *Id.* at 8226-8227.

5. On remand in this case, the Claims Court held that the mere enactment of SMCRA effected a taking of respondents' entire interests in the Whitney coal,[9] and it awarded them compensation for the full value of that coal in 1977, which it found to be $60,296,000, plus interest. App., *infra*, 22a-74a. That valuation, which was based on a report (the Boyd Plan) submitted by respondents, assumed production of 2.5 million tons annually (and total production of more than 53 million tons) on both East and West Whitney. *Id.* at 56a, 68a.[10]

---

[8] BLM previously had tendered another tract (Hidden Water) to comply with the district court's order, but it withdrew that offer after respondents rejected it. C.A. App. 6649-6651, 8002.

[9] Respondents did not amend the complaint to allege a taking at a later date.

[10] By contrast, the mining plans respondents submitted in 1976 and 1978 contemplated far more modest production of one million

In focusing on SMCRA's enactment as the relevant date for determining whether a taking had occurred, the Claims Court relied on a statement by Rep. Roncalio on the House floor that the Whitney coal was covered by a proposed grandfather provision that would have permitted mining on an AVF where there had been substantial financial and legal commitments prior to 1977 (even if no state permit had been obtained). In the court's view, the subsequent deletion of that grandfather provision from the House bill meant that SMCRA's AVF provisions were intended to affect the Whitney coal. App., *infra*, 47a-48a.[11] The court further held that although normally there could be no regulatory taking until an application for a mining permit had been denied as a result of SMCRA's prohibitions, such a denial here would have been a "mere formality" and respondents therefore were not required to obtain an "official determination" that the Whitney coal was covered by SMCRA's AVF permit restrictions. *Id.* at 48a.

Finally, in holding that the effect of SMCRA's enactment on respondents amounted to a taking, the court considered the three factors identified by this Court's takings decisions. See App., *infra*, 30a (citing *Connolly* v. *PBGC*, 475 U.S. 211 (1986), and *Penn Central*, 438 U.S. at 124). First, it found a significant economic impact on respondents because, in its view, there was a market for the Whitney coal when SMRCA was enacted and respondents would have been able to mine the coal. App., *infra*, 31a-41a. Although the Boyd Plan (unlike respondents' 1976 and 1978 proposals) would have required a substantial diversion of the Tongue River, the court believed DEQ

---

tons annually (and a total of 15 or 17 million tons) on East Whitney alone. App., *infra*, 24a, 26a; C.A. App. 1784-1785.

[11] The deleted grandfather provision ultimately was replaced by the provision, involved in this case, that affords a right to obtain federal coal where there was a substantial financial or legal commitment to mining AVF coal prior to January 1, 1977.

would have allowed that diversion. *Id.* at 37a-38a, 39a-40a.

Second, the court found that SMCRA's enactment interfered with respondents' investment-backed expectations. It cited PKS's expenditures of $582,798.80 in advance royalties and $1.5 million for land studies and permit applications, but cited no investments by Whitney Benefits, the owner of the coal. In addition, the court relied on the projections in the Boyd Plan (which was prepared in 1985) for the proposition that hypothetical "investors" in 1977 reasonably could have expected the return on their investments set forth in that Plan. App., *infra*, 41a-42a.[12]

Third, with respect to the character of the governmental action, the court first observed that even in the absence of a physical invasion of the property, a taking may be found if a regulatory measure denies the owner all economically viable use of the land. App., *infra*, 42a. The court concluded that SMCRA had that effect because underground mining was not feasible and because, in its view, PKS's right to use the surface for farming was irrelevant to SMCRA's effect on respondents' coal rights. *Id.* at 43a-44a. The court did not discuss the economic value the Whitney coal retained for purposes of exchanging it for federal coal of equal value. Moreover, the court concluded that the countervailing purpose of the governmental action—to prevent harm to farming, ranching, and water quality in hydrologically sensitive AVFs—did not warrant rejection of the taking claim. The court did note that "[h]istorically, whenever [the] governmental or public interest is directed at preventing a classic nuisance," that justification "almost automatically" led to a finding of no taking (*id.* at 45a (citing *Mugler* v. *Kansas*, 123 U.S. 623 (1887))); but the court believed that *Mugler*

[12] The court did not, however, tie those projections to any actual expectations by respondents, who had abandoned their only attempt to obtain a permit (for far more limited mining) a year before SMCRA was enacted.

and *Miller* v. *Schoene*, 276 U.S. 272 (1928), are now largely "limited to a narrow set of facts." App., *infra*, 45a-46a.

6. The court of appeals affirmed, App., *infra*, 1a-21a, holding that SMCRA had effected a "legislative taking" of the Whitney coal. *Id.* at 8a. Relying upon Rep. Roncalio's floor statement, as well as what it regarded as the "obvious" physical characteristics of the property and the fact that ranching had long been conducted on the surface, the court rejected the government's contention that no taking could occur until respondents had applied for and been denied a permit. *Id.* at 8a-10a. Citing cases outside the takings context holding that full exhaustion of administrative remedies may be excused in certain circumstances, the court held that respondents were not even required to file an application for a permit in order for a taking to occur, because it would have been futile to do so. *Id.* at 6a-7a. The court also rejected the government's contention that the right respondents obtained upon enactment of SMCRA to exchange Whitney coal for federal coal of equal value meant that the Whitney coal retained significant value after enactment and precluded a finding that a taking occurred on August 3, 1977. *Id.* at 12a-15a. The court believed this case to be different from *Penn Central* (which held that the ability of the Terminal owners to transfer development rights to other property should be taken into account in considering the economic impact of the historic preservation ordinance) because the owners there could operate the Terminal at a profit, while here, in its view, there was a total destruction of respondents' coal property right. *Id.* at 13a.[13]

Finally, the court of appeals declined to credit the express purpose of SMCRA's AVF provisions of preserving

---

[13] The court of appeals rejected the government's contention that economically viable use remained because farming was still permitted on the surface acreage acquired by PKS. The court reasoned that the coal estate is a separate estate under Wyoming law, and, in addition, PKS acquired the surface estate only to facilitate mining. App., *infra*, 11a-12a.

fragile hydrological systems—and declined to find that Congress therefore was acting to abate a "nuisance" or prevent conduct "injurious to the health, morals, or safety of the community," App., *infra*, 18a (quoting *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470, 489 (1987))—because Congress chose to allow mining covered by the grandfather provisions, as well as mining that the state regulatory authority finds would have only a minimal impact on an AVF. The court also believed that the public purpose of protecting AVFs would not in any event preclude it from finding a taking, because, in its view, the entire value of respondents' interest in the coal was destroyed. App., *infra*, 17a, 18a-19a.[14]

REASONS FOR GRANTING THE PETITION

The court of appeals has fundamentally distorted regulatory takings jurisprudence in several significant respects. First, the court's holding that a taking can be found under a federal regulatory statute prior to the agency's denial of a permit conflicts with this Court's decisions in *Hodel* v. *Virginia Surface Mining*, *supra*, and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Second, the court's finding of a "legislative taking" by SMCRA itself confuses a regulatory statute that is implemented through an administrative permitting system with a statutory exercise of the power of eminent domain. Third, the view of the courts below that respondents were deprived of all economic value of the Whitney coal immediately upon enactment of SMCRA cannot be squared with SMCRA's simultaneous furnishing of a right to exchange AVF coal for federal coal of equal value, with respondents' own behavior in actively

---

[14] The court of appeals declined to disturb the Claims Court's determination that the value of the Whitney coal in 1977 was approximately $60 million. App., *infra*, 19a-21a.

The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc. Chief Judge Nies would have granted rehearing en banc. App., *infra*, 99a.

seeking such an exchange, and with the holding in *Penn Central* that the ability to transfer development rights to other property must be considered as mitigating the economic impact of regulation. Fourth, the court of appeals erred in dismissing as irrelevant the AVF provisions' substantial public purpose of protecting the sensitive hydrology and agricultural base of AVFs.

The result in this case alone is a windfall award of compensation of more than $60 million, plus interest since 1977, for a total judgment in excess of $140 million— despite the continued availability of federal coal that is equal in quantity and quality to the Whitney coal and the limited nature of respondents' efforts to mine their coal before SMCRA was enacted. In addition, the Federal Circuit—which enjoys exclusive appellate jurisdiction over all takings claims under the Tucker Act—has by this far-reaching decision invited broad circumvention of the administration of federal regulatory programs on a government-wide basis. Review by this Court therefore is warranted.

1. a. The decision of the court of appeals is irreconcilable with this Court's holdings that under a regulatory scheme incorporating a permit requirement, no taking occurs in the absence of a final administrative determination of the application and effect of a statutory provision on private property. The Court has found this rule "compelled by the very nature of the inquiry required by the Just Compensation Clause," *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190 (1985), under which the Court has examined such factors as "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986). These factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the par-

ticular land in question." 473 U.S. at 191. See also *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."); *Penn Central*, 438 U.S. at 136-137; *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980).

Indeed, the Court has already applied these principles to a taking claim based on SMCRA. In *Virginia Surface Mining*, the Court rejected the argument that the "mere enactment" of SMCRA effected a taking because Section 522(e) expressly prohibits surface mining near cemeteries, parks, schools and roads. 452 U.S. at 297 n.40. It found the taking claim to be premature because the coal owners had not sought relief pursuant to administrative procedures under which "a mutually acceptable solution might well be reached with regard to individual properties," because Section 522(e) did not on its face prohibit other uses of the land, and because there were provisions for protecting existing interests in the property. 452 U.S. at 296-297 & n.37; accord *Hodel* v. *Indiana*, 452 U.S. 314, 334-335 (1981). Similarly here, Section 510(b)(5) does not prohibit non-surface mining uses of the land; the coal-exchange procedure provides an opportunity for an equitable solution; and owners of AVF coal retain important rights and economic value by virtue of their ability to exchange it for federal coal. Moreover, the AVF restrictions (unlike those in Section 522(e)) are not absolute; they require an administrative determination about the impact of mining on farming and water resources.

Subsequently, in *Riverside Bayview Homes*, which involved the requirement that a Clean Water Act permit be obtained for wetlands development, the Court relied on *Hodel* in holding that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." 474 U.S. at 126. The Court explained that "[a] requirement that a person obtain a permit before engaging in certain use of his or her property does not itself 'take' the property in any sense; after all, the

very existence of a permit system implies that that permission may be granted, leaving the landowner free to use the property." *Id.* at 127. Accordingly, "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Ibid.*

SMCRA provides that *no one* may engage in surface mining without a permit. 30 U.S.C. 1256(a). If an owner of coal refuses even to apply for a permit, it is that prohibition of general applicability that bars the mining. A particular statutory provision (such as the AVF restriction) is the proximate cause of any adverse effect on the property owner only if and when the agency relies on that provision in denying a duly submitted permit application. Orderly pursuit of the regulatory process established by SMCRA will variously result in the grant, partial grant, or denial of permits, invocation of the coal-exchange mechanism, etc. But the Federal Circuit has ruled that the outcome of that process may be anticipated in the trial of a claim that the statute itself effected a taking. Regulatory process will become regulatory chaos if property owners may go directly to court in this manner, without first requesting a permit and basing any taking claim on the disposition of that request.[15]

The Federal Circuit relied on cases holding that exhaustion of administrative remedies is not required where it would be futile. App., *infra*, 6a (citing *McKart* v. *United States*, 395 U.S. 185 (1969), and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641 (1975)). But *McKart*, *Wiesenfeld* and similar cases excuse only full exhaustion

[15] Where an agency plans to institute action against the landowner, resort to the courts to seek an injunction preventing the agency action might in some circumstances be appropriate. Here, however, the landowner wants to engage in activity that, even if entirely lawful, may be conducted only under the authority of a permit. For this reason, until the agency acts, there is no unlawful or unconstitutional agency action to complain *about*. *A fortiori*, respondents had no legal grounds on which to ask a court for money before asking the agency for (and being denied) permission.

of administrative remedies; they do not excuse a party from presenting the matter to the agency in the first instance. See *McKart*, 395 U.S. at 187-188; *id.* at 204 (White, J., concurring); *Wiesenfeld*, 420 U.S. at 640-641; *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986). Here, when SMCRA was enacted (which is when the court below held that a taking occurred), respondents obviously had not requested *any* administrative decision under that statute.

Moreover, "[t]he question whether administrative remedies must be exhausted is conceptually distinct * * * from the question whether an administrative action must be final before it is judicially reviewable." *Williamson County*, 473 U.S. at 192. Where Congress has declined to regulate private conduct directly through self-executing terms of a federal statute—but has instead assigned to a federal or state agency the responsibility for applying the statute on a case-by-case basis in the context of individual permit applications—a taking by definition cannot occur unless the agency has finally applied the relevant statutory provisions to particular property. Compare *Danforth* v. *United States*, 308 U.S. 271, 286 (1939) (although an Act of Congress that authorized condemnation of property for a flood control project allegedly destroyed the value of targeted property, a taking occurred only when a condemnation action was brought by Executive Branch officials).[16] That is because Congress has authorized only the agency (not the courts) to take the governmental action that might, in turn, constitute a taking of property. A court, therefore, has no authority to adjudicate, in the first instance, how the statute applies to particular property and then find a taking based on that

[16] This case presents no claim of a "temporary taking" resulting from unreasonable delay in administration of the permit process. Cf. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987). That issue was neither raised nor addressed below. The Claims Court decided that a taking occurred upon enactment of SMCRA, before the administrative process could have been invoked.

adjudication. Cf. *Hooe* v. *United States*, 218 U.S. 322, 336 (1910).

b. There is no basis for excluding SMCRA's AVF provisions generally, or this case in particular, from the foregoing principles.

i. A number of determinations must be made by the agency in applying the AVF restrictions. First, it must determine to what extent the coal in question actually underlies or is adjacent to an AVF. The agency then must decide whether surface mining would have any impact on farming on the AVF, and whether it would affect only "undeveloped range lands" or have only a "negligible impact" on agricultural production. 30 U.S.C. 1260(b)(5)(A). The agency also must consider whether the proposed operation would "materially damage the quantity or quality of water in surface or underground water systems." 30 U.S.C. 1260(b)(5)(B). And, finally, it must decide the extent of the resulting limitations on surface mining and the owner's right to obtain federal coal of equal value in exchange.[17] If a permit ultimately is denied in whole or in part, these administrative determinations may then focus the inquiry into the resulting economic impact for purposes of deciding whether the denial amounted to a taking of property.

ii. The permit application process also serves to identify the owner's distinct investment-backed expectations and the time when those expectations may have been defeated. In this case, for example, PKS withdrew its application for a permit to mine East Whitney coal one year before SMCRA was passed; it therefore manifested no live expectation of mining Whitney coal at that time. And when respondents applied for a permit in 1978 as a prelude to requesting a coal exchange, they proposed a

---

[17] The potential complexity of these issues is illustrated by the detailed consideration given respondents' request for an AVF determination by DEQ, which examined the extensive hydrological information concerning the area and quantified the agricultural significance of the affected surface uses. C.A. App. 6340-6344, 6357, 6362, 6371-6375, 6524-6526.

plan of similar, limited dimensions. Yet the court below found a taking not of respondents' ability to mine East Whitney coal to that extent, but rather of the entire value of all Whitney coal, premised on the far more expansive mining contemplated by the Boyd Plan that respondents prepared in 1985 for trial. That approach led to a greatly inflated assessment of SMCRA's actual impact on respondents—effectively equating the establishment of the federal permitting system with an exercise of the power of eminent domain—as well as the amount of compensation.

Furthermore, if the regulated party submits a specific proposal, the agency may decide that it should be denied on independent grounds. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975). In this case, for example, if respondents had sought a permit to conduct the mining operation contemplated by the Boyd Plan, DEQ might have concluded that the substantial diversion of the Tongue River required under that Plan was unacceptable for reasons (derived from either state or federal law) *other* than SMCRA's AVF restrictions. If so, and if the denial for those independent reasons did not constitute a taking attributable to the federal government, the basis for a claim under the Tucker Act would be eliminated.[18]

iii. A permitting process also sheds considerable light on how the public purposes underlying the regulatory

---

[18] Although the Claims Court found, based on testimony at trial, that DEQ would have approved the diversion of the Tongue River (App., *infra*, 38a, 39a-40a), DEQ was never given an opportunity to consider that question; nor were persons who would be adversely affected given an opportunity to contest a diversion proposal. Moreover, respondents have not shown that they had any property-type right, protected by state law, to engage in surface mining in that manner. If they did not, then the denial of a permit under SMCRA would not constitute a taking. Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001, 1005-1006 (1984).

measure are furthered with respect to the particular property, thereby illuminating more precisely the character of the governmental action. For example, the administrative proceedings necessary for making AVF and related determinations under SMCRA may often show the extent to which farming and water quality or quantity would actually be affected by the proposed mining operations. In the unprecedented ruling below, however, the court of appeals has held that those proceedings may be bypassed altogether.

2. The court of appeals also broke important—and far-reaching—ground in its related holding that SMCRA effected a "legislative taking" of Whitney coal. App., *infra*, 8a. This much is crystal clear: SMCRA does not vest title to that coal in the United States. In consequence, Congress did not exercise the power of eminent domain. See *Kirby Forest Indus.* v. *United States*, 467 U.S. 1, 5 & n.5 (1984) (when Congress wishes to appropriate property immediately, it provides for "vesting in the United States 'all right, title and interest' in the land"). Nor did Congress write into SMCRA a prohibition on use of property that applies explicitly and of its own force to respondents' property: SMCRA does not say, for example, that "no surface mining shall be conducted on those tracts of land known as East Whitney and West Whitney." Thus, there likewise was no "regulatory" taking by Congress when it passed SMCRA. Any regulatory taking can occur only when the regulatory agency finds that a permit may not be issued for particular mining.

For its part, the court of appeals was heavily influenced by SMCRA's legislative history. In its view, that history showed that Congress intended the AVF provisions to apply to the Whitney coal. App., *infra*, 8a-10a. That history, however, suggests a more limited point, as we demonstrate in the margin.[19] In any event, legis-

---

[19] The pertinent floor exchange between Reps. Baucus and Roncalio in fact indicates that they did not believe that the AVF provisions

lative history cannot be elevated to the status of a legislative taking. Cf. *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("legislative intention, without more, is not legislation"). At most, floor statements by a decidedly interested Congressman (see note 19, *supra*) indicate how he believed the *regulatory agency* should apply what are, after all, statutory conditions on the agency's authority to issue permits.

For the foregoing reasons, DEQ could not have denied respondents' application for a permit to mine Whitney coal by relying on nothing more than a single Congressman's statements—as an indication of a congressional "intent" that mining of that coal should not be allowed—without making the statutorily specified findings. If the factual premises on which Rep. Roncalio proceeded were erroneous, respondents surely would have been entitled to prove that error in the administrative proceedings. Otherwise, a single Member of Congress could effectively "take" property on behalf of the United States by inserting a statement in the Congressional Record. That is too extravagant for even the most ardent proponents

---

would bar all mining on the Whitney tracts. The bill reported in the House fully grandfathered three classes of mines: those producing coal, those covered by a state permit, and those for which there had been substantial financial and legal commitments. See 123 Cong. Rec. 12,368 (1977). During the floor debate, Rep. Roncalio produced a list of projects in each category, and mentioned Whitney as falling in Class III. *Id.* at 12,369. Rep. Baucus offered an amendment to eliminate grandfather protection for Class III, expressing the belief that the restriction would affect only a small part of such operations. *Id.* at 12,862. The following exchange then took place (*ibid.*):

> Mr. RONCALIO. And that is similarly true of the other mines in the list appearing on page 12639 in class III [the list containing Whitney]?
>
> Mr. BAUCUS. That is correct.

This exchange strongly suggests that the Members did not believe that eliminating the grandfather protection would completely bar mining of Whitney coal.

of legislative history's interpretative uses seriously to maintain. Cf. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 & n.15 (1982); *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 118 (1980); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979).

3. The court of appeals' holding that a taking occurred immediately upon enactment of SMCRA also ignores the significance of the coal-exchange program.[20] The very same paragraph of SMCRA that the court of appeals found to have deprived respondents of all value in Whitney coal simultaneously conferred on owners of coal that cannot be mined by virtue of the AVF restrictions the right to exchange it for federal coal of equal value—a benefit that owners of coal located elsewhere did not, and do not, enjoy. Whitney coal therefore retained significant value after SMCRA's enactment. And respondents acted on that premise, by actively pursuing a coal exchange.

The court of appeals' finding of a taking immediately upon enactment of SMCRA, despite the coal-exchange mechanism, cannot be squared with *Penn-Central*. There, the Court refused to find a taking as a result of the owners' inability under the historic preservation ordinance to construct an office building above Grand Central Terminal, noting, *inter alia*, that the economic impact of the ordinance was mitigated by their right to transfer development rights to other parcels. 438 U.S. at 113-114, 137; see also *Hodel* v. *Irving*, 481 U.S. 704, 717 n.2 (1987). The court of appeals sought to distinguish *Penn Central* on the ground that the owners of the Terminal could continue to operate it at a profit, while here respondents cannot mine Whitney coal. But just as the ordinance in *Penn Central* did not interfere with any existing use of the Terminal, so here SMCRA did not

---

[20] Even if respondents were able to overcome the foregoing obstacles to their claim, they would be required to show, at a minimum, that SMCRA deprived them of all economically viable use of the coal as of August 3, 1977. See *Virginia Surface Mining*, 452 U.S. at 295-296; *Agins*, 447 U.S. at 260.

interfere with any existing use of the Whitney tracts. Respondents here, like the Terminal owners in *Penn Central*, sought to engage in a new use of the property by exploiting additional rights associated with it (mineral rights in this case, air rights in *Penn Central*). It was that *new* use that was the subject of regulation. Respondents' right to transfer their mining rights to other coal therefore is directly analogous to the Terminal owners' right to transfer their air rights to other buildings.[21]

Furthermore, even if the coal-exchange mechanism would not altogether eliminate the possibility of a taking, federal coal of equal value would constitute compensation for any taking that may be found. As a result, any such taking would not give rise to a cause of action under the Tucker Act. *Monsanto*, 467 U.S. at 1013, 1018 n.21; *Williamson County*, 473 U.S. at 194-195.

---

[21] The court of appeals erroneously dismissed the coal-exchange mechanism as a basis for post-enactment value on the ground that the government had not offered evidence of that value at trial. App., *infra*, 13a. It is not the government's burden to prove the AVF provisions left coal owners with something of value; it was respondents' burden to establish a total destruction of value as a result of the mere enactment of SMCRA. *Keystone Bituminous Coal*, 480 U.S. at 493-495; *Virginia Surface Mining*, 452 U.S. at 295-296; *Agins*, 447 U.S. at 260. Given that SMCRA confers a statutory right to exchange AVF coal for coal of equal value, respondents plainly could not do so. The court of appeals erroneously believed the Claims Court had found that Whitney coal retained no economic value despite the availability of a coal exchange and that this supposed finding was not clearly erroneous. App., *infra*, 11a. In fact, although the Claims Court recited the government's contention that the Whitney tracts retained value as a result of the coal-exchange (*id.* at 43a), it did not specifically address that contention (see *id.* at 43a-44a), and it therefore made no "finding" with respect to it. Compare *id.* at 70a-71a (discussing coal exchange only as an alternative means of obtaining compensation). In any event, because the retained economic value of Whitney coal at the time of enactment by virtue of the coal exchange provision stems from SMCRA itself, and therefore presents a question of law, any contrary "finding" by the Claims Court would not be subject to review under the clearly erroneous standard. *Kirby Forest*, 467 U.S. at 15 n.24.

The court of appeals nevertheless concluded (on the first appeal) that respondents were not required to pursue or complete a coal exchange before bringing an action under the Tucker Act, in part because it believed that SMCRA would be of "dubious constitutionality" if it required them to accept other property, rather than money, as compensation for a taking. App., *infra*, 80a. In the *Regional Rail Reorganization Act Cases*, however, the Court found the "clear implication" of its decisions to be that payment of compensation in a form other than cash would be permitted by the Fifth Amendment, even where the government exercises the power of eminent domain. 419 U.S. at 150-151 (citing *Bauman* v. *Ross*, 167 U.S. 548, 584 (1897), and 3 P. Nichols, *Eminent Domain* §§ 8.62 *et seq.* (rev. 3d ed. 1974)). The Court did not resolve that question, however, because it concluded that the Act of Congress involved was not an eminent domain statute, but rather a reorganization statute enacted pursuant to Congress's bankruptcy power. In that setting, the Court held that compensation for the alleged "conveyance taking" of railroad properties could be in the form of securities and other non-cash benefits. 419 U.S. at 151-155. So here, like the Regional Rail Reorganization Act of 1973, SMCRA is *not* an eminent domain statute; it is a *regulatory* statute. At least in that setting, the right to obtain an equivalent amount of a largely fungible product may fairly be regarded as "just" compensation. Cf. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (compensation must be a "full and just equivalent" of the property taken).

For these reasons, and contrary to the court of appeals' view, an owner of coal affected by SMCRA's AVF provisions not only must obtain a final administrative determination of the extent to which mining is prohibited before governmental action under SMCRA may ripen into a taking of AVF coal (see pages 14-20, *supra*); the owner also must pursue a coal exchange. Only then would the court in a subsequent Tucker Act suit be in a

position to ascertain both the true economic impact of the permit denial and whether the substitute rights offered or accepted in the coal-exchange process represented fair and adequate compensation for any taking that might be found. As the Court explained in *Monsanto*: "Exhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation of the statute provides compensation, no taking has occurred and the [property owner] has no claim against the Government." 467 U.S. at 1018 n.21.

4. Finally, the court of appeals erred in treating as wholly irrelevant the important role played by the AVF provisions of SMCRA in protecting water supplies and agricultural production in the hydrologically delicate AVFs of the West. In *Keystone Bituminous Coal*, the Court stated that "the nature of the State's action is critical in takings analysis." 480 U.S. at 488. Although the Court refrained from relying on this factor alone in holding that the mining statute there at issue did not, on its face, result in a taking of property, *id.* at 492-493, the Court stressed that "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." *Id.* at 492. The Court thus reaffirmed that the nature of the public problem addressed by the regulation is relevant, and that the test for a taking is not solely whether economically viable use remains in a particular piece of property. See also *Hodel* v. *Irving*, 481 U.S. at 712-713, 716, 718; *Connolly* v. *PBGC*, 475 U.S. at 224-225; *Penn Central*, 438 U.S. at 124.

The prevention of injury to water quality and quantity in and near flowing streams, and to agriculture that depends on the special hydrology of permeable AVFs, is sufficiently akin to the prevention of a nuisance that the purposes of the AVF restrictions in SMCRA should not be denied any weight in the taking analysis—especially where, as here, the proposed mining would require diversion of an interstate river and digging up

its valley floor. Cf. *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Miller* v. *Schoene*, 276 U.S. 272 (1928). In applying a statute with multiple purposes, such as this one, it may be necessary for a court to assess whether a particular regulatory action is so directly related to the protection of public health, safety, or property as to be analogous to the abatement of a nuisance. The court of appeals here declined to assess the significance of the statutory purposes, either in general or as applied to the Tongue River and the East and West Whitney tracts, because it erroneously believed that the strength of the public purpose was irrelevant (App., *infra*, 18a-19a)—an error all the more egregious in light of respondents' right to exchange Whitney coal for federal coal of equal value.[22]

5. The decision of the court of appeals warrants review by this Court. In this case alone, its several manifest errors have resulted in a judgment in excess of $140 million, including interest since 1977. That award

---

[22] The court of appeals also sought to impeach the public purposes served by the AVF provisions by pointing out that Congress enacted grandfather protection for mining operations affecting AVF coal where some coal had been mined in commercially paying quantities or permits had been obtained when SMCRA was passed. App., *infra*, 18a. But Congress reasonably could conclude that where mining has already commenced, the likelihood of preventing environmental harm was sufficiently diminished that it would not be worthwhile to apply the new AVF restrictions; and where permits had already been obtained, the proposed mining at least had been found to satisfy state land-use, water-quality, and other standards. Moreover, both grandfather provisions protect those owners of AVF coal who had the strongest expectation that they would be allowed to mine, and Congress reasonably could conclude that the economic impact of the AVF restrictions would generally be more severe on those owners than on others who had taken only tentative steps (or no steps at all) to do so. The special protection afforded persons in respondents' position is similarly tailored: although respondents cannot mine the particular AVF coal (since they withdrew their pre-SMCRA application for a state permit to do so), Congress protected whatever investment-backed expectation they might have had, and mitigated the economic impact, by affording them a right to obtain federal coal.

is a windfall, in light of respondents' right to obtain federal coal that is equal in quantity and quality to the Whitney coal and their limited efforts to mine that coal before SMCRA was enacted. The decision also threatens to undermine entirely the efficacy of the coal-exchange program Congress enacted.

The consequences of the Federal Circuit's errors extend well beyond this case and statute, however. That court has exclusive appellate jurisdiction over all takings claims under the Tucker Act. The decision below is therefore controlling, but erroneous, precedent on a number of important questions arising in takings cases against the United States generally. It also invites broad circumvention and disruption of the permitting process under federal regulatory programs on a government-wide basis.

The best interests of the public and of private property owners generally in orderly adjudication of takings claims require the courts to adhere strictly and uniformly to the settled rule that a taking claim must be based on definitive action by the responsible regulatory agency, because that rule ensures the existence of a readily identifiable point at which a taking claim may (indeed must) be presented. By contrast, under the Federal Circuit's decision in this case, whenever it might appear that a permit would almost surely be denied under a federal regulatory statute (and that any taking therefore occurred upon enactment of the statute), the affected party would be required to present a taking claim within six years after enactment. See 28 U.S.C. 2501. As a result, other owners of coal underlying an AVF (and owners of property affected by other regulatory statutes) may now be time-barred from bringing a taking claim. And to avoid any question along these lines in the future, many regulated companies and individuals might feel compelled to file a taking claim soon after passage or amendment of a regulatory statute, even if they have no intention of seeking a permit to develop their property until many years later (if at all). The rule of administrative finality

avoids this confusion and premature or unnecessary litigation, and it preserves to the owner the important prerogative of seeking permission to develop his property at a time of his own choosing and seeking compensation when and if permission is denied. It therefore promotes the overarching principle of "fairness and justice" on which the Just Compensation Clause is based. *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). The Court should grant review because the Federal Circuit has now greatly unsettled that rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JACQUES B. GELIN
JOHN A. BRYSON
Attorneys

JULY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5058

WHITNEY BENEFITS, INC. AND
PETER KIEWIT SONS' CO.,
PLAINTIFFS-APPELLEES

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Appealed from: U.S. Claims Court
Chief Judge Smith

Decided: February 26, 1991

Before MARKEY, NEWMAN, and CLEVENGER, *Circuit Judges.*

MARKEY, *Circuit Judge.*

Appeal from a judgment of the United States Claims Court (Smith, C.J.) that the United States (government) took a mineral estate (Whitney coal) from Whitney Benefits, Inc. and Peter Kiewit Sons' Co. (PKS) (collectively Benefits) upon enactment of the *Surface Mining Control and Reclamation Act of 1977*, 30 U.S.C. §§ 1201 *et seq.* (SMCRA), and requiring payment of $60,000,000, plus interest to Benefits.[1] We *affirm.*

---

[1] A brief urging affirmance was filed by Pacific Legal Foundation as *amicus curiae.*

I. BACKGROUND

The facts are set forth in *Whitney Benefits v. U.S.*, 752 F.2d 1554 (Fed. Cir. 1985) and in the comprehensive findings and conclusions accompanying the judgment appealed from. *Whitney Benefits v. U.S.*, 18 Cl. Ct. 394 (Cl. Ct. 1989). All of the probative facts being thus readily available to a reader of this opinion, no useful purpose would be served by a mere recast in our own words of Chief Judge Smith's exhaustive exposition of the facts in his scholarly and well-reasoned opinion.

II. ISSUES

A. Whether the Claims Court correctly concluded, based on not-clearly-erroneous findings, that on enactment SMCRA's prohibition of surface mining of alluvial valley floors (AVF's) constituted a taking of the Whitney coal property.

B. Whether the Claims Court's valuation of the coal property taken is clearly erroneous.

III. DISCUSSION

INTRODUCTION

A key element in this case is that SMCRA expressly precluded a permit for surface mining an AVF described in the statute in terms precisely applicable to, and known to be applicable to, the AVF overlying the Whitney coal property.

Contrary to the tone and tint of the government's arguments on this appeal, the constitutionality of SMCRA is not at risk here. Benefits accepts the untrammeled right of Congress to prohibit surface mining of its Whitney coal property. All Benefits seeks is the aid of the courts in forcing governmental

compliance with the compensation clause of the Fifth Amendment to the Constitution. After an extended trial, the Claims Court found that Benefits had proved facts establishing its right to compensation and the amount thereof that would be just. The case is fact-specific and basically uncomplicated, dealing only with Benefits' property right to mine a single specific deposit of coal (Whitney coal) and the market value of that right. In attempting to shoulder the heavy appellate burden of establishing that the judgment appealed from rests on reversible error, the government proffers a plethora of attorney arguments and assertions, none of which finds adequate support in the evidence, all of which are treated and rejected in what follows.

A. *Taking Upon Enactment in 1977*

On this issue the government argues that: (1) the standard of review is *de novo*; (2) no taking could occur until Benefits had applied for and been denied a mining permit; (3) SMCRA did not prohibit Benefits from mining the "Whitney coal"; (4) SMCRA did not deprive Benefits of all economic use of its property; and (5) the Claims Court failed to consider Congress' motivation.

1. Standard of Review

The government cites *Bowen v. Public Agencies Opposed To Social Security Entrapment*, 477 U.S. 41, 51-55 (1986), but *Bowen* dealt only with a legal issue and did not address the standard of review. This court reviews Claims Court judgments to determine whether they are "incorrect as a matter of law" or premised on "clearly erroneous" factual determinations. *Heisig v. United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983).

Having asserted a right to review "de novo", the government then misconstrues the nature of such review and the posture of the case, arguing for the most part as though the Claims Court had not conducted a six-day trial and simply ignoring this court's direction in the earlier appeal that the Claims Court make findings on the factual questions it did.[2]

2. Mining Permits

Calling SMCRA a "regulatory statute", the government says it could not be deemed a taking until an expert agency applied its judgment and field reconnaissance to evaluate the surface of the land. The government does not suggest, and did not suggest at trial, any basis whatever on which a permit could be legally granted to surface mine Whitney coal. Indeed, SMCRA expressly provides that "no permit shall be approved" under conditions precisely descriptive of the Whitney coal estate.[3] The Government has

---

[2] In a surprising display of how to misread a court opinion, the government says the dissenting judge in *Whitney Benefits*, 752 F.2d 559-562, "conclud[ed] that enactment of SMCRA had not taken [Benefits'] property". As that dissent made plain, it was based on an apparent failure of the complaint to allege prohibition of all mining methods and suggested that Benefits might amend to allege inability to mine "by any means permitted under § 260". That the prohibited method, surface mining, is the only method of mining the Whitney coal deposit is now uncontested.

[3] 30 U.S.C. § 1260(b) states:

> (b) No permit . . . shall be approved unless
>
> . . .
>
> (5) the proposed surface coal mining operation, if located west of the one hundreth meridian west longitude, would—
>
> (A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally

not shown clear error in the Claims Court's finding that any surface mining permit application would in this case have been futile. Indeed, the record is clear that any such application was obviously and absolutely foredoomed on the day SMCRA was enacted.[4]

The government's facile application of the label "regulatory" and its citation of cases dealing with congressional regulation of the uses of land and other property subject to many uses are inapt here. First, as the Claims Court correctly found, the *only* property here involved is the right to surface mine a particular deposit of coal. The only possible use of that right is to surface mine that coal. When Congress prohibited that mining of that coal, it did not merely regulate, it took, all the property involved in this case. Second, if SMCRA could somehow be deemed "regulatory" in this case, it would avail the government nothing, for a regulatory statute that "goes too far", will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Even if labeled "regulatory," the present statute "went too far" in relation to Whitney coal and its circum-

---

subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the regulatory authority finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production.

[4] The government makes much of a permit application filed by Benefits in 1978, but disregards a major fact: Benefits was directed to file that application as part of its effort to obtain a coal exchange. The Claims Court correctly found that Benefits never sought a permit to mine their coal after SMCRA's enactment. The government's use of a "permit process" as interchangeable with "exchange process" is inappropriate.

stances, when it prohibited surface mining and provided that "No permit . . . shall be approved" under those circumstances. That a permit might be obtained to mine coal properties *other* than Whitney coal does not change the statute to one that merely seeks to "regulate" the mining of Whitney coal for which no permit could legally be obtained. Before SMCRA was enacted, Benefits had a property right it could expect to exercise, i.e., to surface mine the Whitney coal. The moment SMCRA was enacted, Benefits no longer had that property right, for it had no permit and could not possibly under the statute obtain one for a mine that would obviously violate the conditions expressly set forth in SMCRA. 30 U.S.C. § 1260.

We are, of course, fully aware of the cases favoring administrative action. Many are here cited by the government. But in those cases administrative action might have had an effect on whether there was a taking. This is not such a case. On the contrary, this case falls among those in which the Supreme Court has found no need to exhaust administrative remedies: *Weinberger v. Weisenfeld*, 420 U.S. 636, 641 (1975) (no need to exhaust because statute "on its face precludes granting benefits to men"); *McKart v. United States*, 395 U.S. 185 (1969) (no need where facts clearly fit statutory definition). If there be coal properties to which SMCRA's permit provision might apply, Whitney coal is not and never was such a property. Hence the Claims Court correctly held that "it would be unreasonable under the particular facts of this case to hold that a taking could not have occurred until a subsequent administrative determi-

nation was made that mining of Whitney coal was prohibited." [5]

3. *SMCRA Prohibited Mining Whitney Coal*

In 1985, this Court said a taking occurs "when economic development [is] effectually prevented." *Whitney Benefits*, 752 F.2d at 1559. On remand, the Claims Court carefully considered and discussed every factual and legal argument the government presented and found as a fact that in 1977 SMCRA clearly prohibited surface mining of Benefits' coal, thereby depriving Benefits of "all economically viable use" of its property and destroying its value. That finding is not only correct and fully supported by the evidence, it is entitled to respect and may be upset only if it is shown to have been clearly erroneous. *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 (Fed. Cir. 1983). The government has made no such showing, but, as in *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984) and *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 586 (Ct. Cl. 1970), has on appeal carried its attempt to deny the impact of SMCRA on Whitney Coal to unreasonable lengths in an apparent hope of postponing the day of reckoning into eternity. In this case, it has taken that tactic too far.

First, immediately before trial, the government stated in a Federal Register statement by BLM that "[d]evelopment of the [Whitney] coal was halted by the passage of [SMCRA]." 51 Fed. Reg. 3124, 3125 (January 23, 1986). Having made that concession,

---

[5] The Claims Court noted and treated the government's assertions that: (1) Benefits must have first sought a permit, 18 Cl. Ct. 407; *and* (2) Benefits could not have obtained a permit, 18 Cl. Ct. 403.

the government offered absolutely no evidence at trial to counter that official statement. Nor did it present a single witness to testify that there was any uncertainty whatever about SMRCA's taking effect on Benefits' coal property in 1977.

Second, Benefits proved that SMCRA's AVF prohibition applied to the property because of obvious physical facts about the property. The AVF overlying most of the Witney coal was described as plain to the eye, and farming and ranching had long operated on the surface above the Whitney coal. At trial the government stipulated the foregoing facts about the property. As the Federal Register statement reflected, the government knew SMCRA applied on enactment to Whitney coal. Benefits knew SMCRA applied; and any prospective buyer would know it applied.

Thus, the facts proven in this case are even more probative of a taking than those in *Skaw*. There, owners of mineral interests under Idaho's St. Joe River alleged that their property was taken by a statute that destroyed mining rights under the St. Joe. As this Court recognized in the prior appeal of this case, it was held in *Skaw*, 740 F.2d at 938-40, that the plaintiffs would show a legislative taking if they "could try on the shoe and it fit"—i.e., by proving at trial that their interests lay within the boundaries of the prohibition and that they could not be mined by methods other than surface methods. As the Claims Court fully elucidated, that is just what Benefits proved here.

Third, SMCRA's legislative history confirmed the presence of a legislative taking of the Whitney coal property. Congress was carefully attentive to the question of which particular coal properties it was

affecting.[6] In considering the scope of the AVF prohibition itself, and the effect of "grandfathering" mines already operating and those with *de minimis* AVF involvement, Wyoming's Representative Roncalio warned that grandfathering AVF mines that had made "substantial legal and financial commitments," but that had not yet actually received a permit to mine, presented the "strong possibility" that the "Whitney Benefits mines on the Tongue River in Sheridan County in Northern Wyoming" would be grandfathered. 123 Con. Rec. 12638-9 (1977). He urged that the bill be revised—as it eventually was—to ensure against even the possibility that the Whitney property would escape the AVF prohibition. The government's attack on this legislative history simply

---

[6] *See, e.g., ICF, Inc. Study Inquiry: Hearing on the Report by ICF, Inc., on the Energy and Economic Impacts of the Surface Mining Control & Reclamation Act of 1976 Before the Subcomm. on Public Lands & Resources of the Senate Comm. on Energy & Natural Resources,* 95th Cong., 1st Sess. 45 (1977) (as part of the ICF, Inc. Study, the E.P.A. conducted aerial flyovers of "virtually all" of the 70 to 100 proposed western mining sites known to the Bureau of Mines) ; *Surface Mining Control & Reclamation Act of 1977: Hearings Before the Subcomm. on Energy & the Environment of the House Comm. on Interior & Insular Affairs,* 95th Cong., 1st Sess., Part II, 219-236 (1977) (Subcommittee viewed slides of AVFs in Wyoming and Montana and reviewed list of proposed surface mines in four states including Wyoming that might be affected by the AVF provisons of SMCRA) ; *Id., Pat III,* 57-61, 400, 405-407 (representatives of companies with existing and proposed mines in Wyoming testified about SMCRA's grandfather clause) ; *Surface Mining Control & Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands & Resources of the Senate Comm. on Energy & Natural Resources,* 95th Cong., 1st Sess. 839, 842-43 (1977) (owner of surface land overlying Whitney coal effectively asked Congress not to grandfather Whitney coal).

ignores what Congress *did*. Congress revised the bill to insure that SMCRA itself *would* preclude the mining of Whitney coal.

Still, the government insists that uncertainty remained about SMCRA's prohibition against mining the Whitney coal, citing Rep. Roncalio's explanation of how the grandfather clause "might affect" certain mines. But the phrase related to "financial and legal commitments",[7] not to the prohibition of mining. Indeed, Rep. Roncalio went on to recommend an amendment that would make clear that the grandfather clause would *not* apply to Whitney. 123 Cong. Rec. 12,638-39 (1977). There never was any doubt that adoption of his amendment would insure that the AVF prohibition would apply with full force to the Whitney coal property. The government's effort here to construct such a doubt is insupportable.

Oddly, while saying reliance on Rep. Roncalio's actions is inappropriate, the government itself relies on a list offered by him. The list identified 13 mines on which AVF's represented only 0% to 3.7% of the mine area. Again, the government's reliance is inapt, for the list covered only mines with "federal involvement"—those including federally leased coal—and by definition excluded fee coal like Whitney. Moreover, the small areas of AVF overlying the listed mines actually dramatize the taking effect of SMCRA on Benefits, whose entire coal property was either covered by an AVF or rendered unmineable by it.

The government's argument that SMCRA did not prohibit mining Whitney coal is simply untenable. The facts correctly found by the Claims Court on Benefits investment and on "the economic Impact

---

[7] Benefits proved a pre-SMCRA investment of well over a million dollars. 18 Cl. Ct. at 397.

of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action," *Whitney Benefits*, 752 F.2d at 1558, establish that SMCRA on enactment effected a taking of Benefits' Whitney coal estate.

4. *SMCRA Deprived Benefits of All Economic Use*

On this issue, the government continues to cite language in cases in which a statute regulated but one or a few of numerous uses to which the involved properties might be put. As above indicated, the property here involved, Whitney coal, has only one use and that use is prohibited by SMCRA. In a strained effort to construct some other "economic use" or "economic benefit" remaining after enactment of SMCRA, the government says: (a) Benefits could farm some land, and (b) the coal exchange preserved the economic value of Whitney coal. Neither assertion finds a basis in the record or in law in this case, and neither renders clearly erroneous the Claim Court's finding that the "diminution in value [of Whitney coal] was total."

a. Farming

PKS bought a parcel of a little less than 600 of the 1327 acres overlying Whitney coal. Continuing to disregard inconvenient findings, the government ignores the Claims Court's findings that the purchase was to facilitate PKS' intended mining of the Whitney coal beneath the parcel and then goes on to speculate, without reference to the record, that PKS might have been able to farm that parcel. On that speculative premise, the government says SMCRA did not deprive Benefits of all economic value. The purchase of the parcel to facilitate mining was clearly a part of the investment backing for Benefits' expecta-

tions, not unlike a purchase of mining equipment. We fully agree with the Claims Court's evaluation of the argument as "completely off the mark". SMCRA took Benefits' *coal rights*. That is what, and only what, this suit is all about. As the Claims Court noted, Wyoming recognizes separate mineral and surface estates, *Williams v. Watt*, 668 P.2d 620, 624-25 (Wyo. 1983) and mineral rights are clearly property subject to the taking clause of the Fifth Amendment. *Skaw*, 740 F.2d at 935-36.

Labeling Benefits' demand for compensation as a "facial" challenge to SMCRA, the government relies extensively on *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But the demand for just compensation here is clearly distinct from the merely argumentative challenge to SMCRA rejected in *Hodel*. Unlike the property owners in *Hodel*, *Benefits* has presented solid proof of the impact of SMCRA, an impact that on enactment deprived Benefits of all economically viable use of its coal property. We are not at liberty to disregard, as the government would have us do, the complex and voluminous proofs presented to the Claims Court and on which that court based its detailed findings of SMCRA's investment-destroying impact on the particular deposit known as Whitney coal. Those findings were not the result of some general discussion of the statute, but were compelled by the evidence and have not been shown to have been clearly erroneous.

b. *The Coal Exchange*

Choosing to disregard what this court had to say in *Whitney Benefits*, 752 F.2d 1557-1559, about the coal exchange provision, 30 U.S.C. § 1260(b)(5), and this court's language distinguishing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104

(1978), the government relies primarily on *Penn Central* in arguing that the coal exchange gave Benefits "something of significant value" and thus SMCRA could not have been a taking.

The government's election to present its coal exchange argument on this appeal is difficult to understand in light of this holding of this court:

> the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any exchange and pursue a money award under the Tucker Act, 28 U.S.C. § 1491.

Whitney Benefits, 752 F.2d at 1560.

Though the government asserts that the possibility of an exchange represented a post-SMCRA value, it offered no evidence thereof at trial and the segment of its brief devoted to the exchange provision contains not a single record citation. When the government does not disregard the language in our earlier opinion, it manages to misinterpret it, taking this court's *distinction of Penn Central*, 752 F.2d 1557 ("a regulation not meant to take an interest in land") and the indication that in cases *like Penn Central* an exchange provision might be considered in determining whether and when a taking occurred, as a basis for charging error in the Claims Court's failure to do so. The government apparently failed to notice that in *Penn Central* the owners retained the railroad station and that in this case the Claims Court found a total destruction of Benefits' coal property right.

Benefits points to a district court's May 1985 finding that the government had "unreasonably delayed"

in performing an exchange, the government's response to an order of that court in which the government said Whitney coal had no value, the government's pretrial and post-trial switching between offers of Hidden Water and Ash Creek, and the government's insistence on valuing any exchange at the vastly depressed coal prices in effect at the time of the exchange. Disputing none of that, the government's reply brief says we must not look at any of it, or at any event in the last 13 years, because it all occurred after enactment of SMCRA.[8] Whatever may be the validity of the government's strident insistence that the words of the statute must serve as absolutely the sole evidence on the question of whether SMCRA was a taking, the argument avails the government nothing when one looks to the statutory words, and particularly to those relating to the exchange provision. Among the portions of this court's opinion in *Whitney Benefits* disregarded by the government is this: We repeat the statutory words—

> It is the policy of Congress that the Secretary shall develop and carry out a coal exchange program to *acquire* private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for federal coal which is not so precluded. [Emphasis supplied.]

752 F.2d at 1559.

Thus the statutory exchange provision itself in this case confirms the presence of a taking ("acquire") of Benefits' "fee coal precluded from being mined by

---

[8] In its main brief segment on the coal exchange, the government cites a post-enactment fact (again without record reference): "the government has now proceeded to offer an exchange of coal in this case."

the restrictions of this paragraph (5)". That the government may in a statute take property and simultaneously offer to pay for it may evade a constitutional challenge. But a compensated taking is still a taking. An offer to pay would make no sense if nothing were taken. The exchange provision confirms the presence of a taking of coal to which it applies and the statute itself, 30 U.S.C. § 1260, *supra* note 2, establishes its application to Whitney coal.

As the Claims Court correctly held, SMCRA destroyed all economic value in *Whitney* coal. As this court held in *Whitney Benefits*, 752 F.2d at 1557, the exchange provision cannot be made mandatory without raising serious constitutional questions. To hold that mere presence of an exchange provision precludes a court from finding a taking on enactment in cases like this one would eviscerate the constitutional just compensation guarantee.

5. *Congress' Motivation*

The government's effort to visualize and then to apply to this case a "nuisance exception" that would justify the total uncompensated destruction of Benefits' investment-backed expectations in its Whitney Coal property is twice-flawed: (1) there has been no showing that the facts in this case correspond to those in earlier cases dealing with injury to public health and safety; and (b) expressly recognizing the need to balance the continuing dual need for agriculture and the energy available from coal, Congress *permitted* continued surface mining of coal underlying some AVF's, indicating its view that all AVF mining was not in itself a "nuisance".

a. *Facts in Earlier Cases*

Citing phrases from opinions in earlier cases, the government appears to have lost sight of the critical role of facts as the foundation stones on which law and precedent must stand. Relying primarily on *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987), the government argues that SMCRA's AVF prohibition effected no taking because it was aimed at a public purpose entitled to "deference". Nothing in *Keystone*, however, supports the notion that public purpose alone permits total destruction of property rights without compensation. The government simply ignores *Keystone's* analysis: a regulation effects a taking if it *either* (1) "does not substantially advance legitimate state interests," *or* (2) "denies an owner economically viable use of his land." 480 U.S. at 470, quoting *Agins*, 447 U.S. at 260, and citing *Penn Central*, 438 U.S. at 124. *See also Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (these are "entirely separate question[s]").

Under the second prong of the analysis in *Keystone*, SMCRA denied Benefits all use of their property and completely destroyed its value. Thus Benefits is in the position occupied by the citizens in *Mahon*, who were denied all economically viable use of their coal, and in a fundamentally different position from that of the citizens in *Keystone*, who were not.[9] In *Keystone*, the Subsidence Act simply re-

---

[9] Professor Tribe, in noting that *Mahon* remains good law after *Keystone*, spoke of the "rare takings case in which, as the result of a legislative enactment, is was impossible for the parties to engage in their business profitably." L. Tribe, *American Constitutional Law*, 591 n.14 (2d ed. 1988). The present is such a "rare takings case".

quired a small portion (1.8%) of the involved coal to be left in the ground. 480 U.S. at 496. That was critical to the Court, which noted ". . . petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. *Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit.*" 480 U.S. at 495-96 (emphasis added). As the record here makes plain, Whitney coal is such a mine.

Thus, in the present case, as in *Keystone*, the surface-related purpose of the statute is valid, but not controlling. The Court in *Keystone* went on separately to analyze the *impact* of the regulation on the properties before it, and found evidence of value destruction wanting. Here the Claims Court also thoroughly analyzed the *impact* of SMCRA, and correctly found compelling the evidence of value destruction. The evidence having shown the total destruction of all economically viable use, the conclusion is inescapable that SMRCA constituted a taking of the Whitney coal property. That the government may certainly do, but when it does so in the circumstances of this case it is required by the Constitution to pay just compensation.

b. *Congress' Purpose*

The Claims Court quoted from the statute Congress' purpose in enacting SMRCA: [10]

---

[10] The government unfairly criticizes the trial court, saying it "virtually ignored this aspect of takings analysis". The contrary is true. *See* 18 Cl. Ct. at 406. The government's true complaint is that the Claims Court relied on modern Supreme Court cases and refused to agree with the government's argu-

> [to] assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and [to] strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

That Congress was not in SMRCA abating a "nuisance", within the meaning of Supreme Court and other cases discussing such abatement, is clear. In accord with the dual purpose it stated, Congress expressly *permitted*, in the grandfather clause, the continued mining beneath AVF's of all grandfathered mines and all mines found by State Authorities to have minimal AVF involvement, hardly the action of one out to abate a "nuisance" or anything "injurious to the health, morals, or safety of the community", *Keystone*, 480 U.S. at 489. Congress also provided for regulations designed to restore the hydrologic balance affected by such mining, regulations Benefits proved it could have complied within mining Whitney coal. Nonetheless, SMCRA expressly provided that "No permit . . . shall be approved" for a mine such as Whitney coal which underlies the AVF precisely as described in the statute. SMCRA, as above indicated, thus destroyed all value in Whitney coal.

The Claims Court went on to note, and we agree, that the present case "presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminu-

---

ments based on the "police power" cases decided in 1887 and 1928: *Mugler v. United States*, 123 U.S. 623; *Miller v. Schoene*, 276 U.S. 272. Amicus' brief presents a thorough review of the metamorphosis of takings jurisprudence, citing and discussing cases decided over the years 1853 through 1987.

tion in value of the property at issue that the court has found." The government has not cited to us a single case in which the Supreme Court has relied on the "public purpose" of a regulation or statute as a basis for finding that no taking occurred when, as here, the *entire value* to the owner of the involved property *was destroyed.* The government's talismanic cry for reversal because "public purpose" requires "deference" is simply a too-facile misapplication of the constitutional parameters of takings law to the facts in this case.

B. *Valuation*

After a six-day trial, the Claims Court considered every evaluation issue addressed and all evaluation evidence submitted at trial. It then made an explained detailed findings, some for Benefits and some for the government. On appeal, the government fails to show that any finding of the Claims Court was clearly erroneous.

We need not tarry long on the government's evaluation arguments because: they rest basically on a complaint that the Claims Court agreed more often with Benefits' experts than it did with the government's; each of the challenged findings is supported in the record and citation of conflicting testimony does not establish error in the findings made; [11] the Claims Court's use of alternative assumptions, agreeing fully with neither side, represented not error, but reasoned decisionmaking; [12] much of the govern-

---

[11] *Anderson v. Bessemer City,* 470 U.S. 564, 574 (1985) ("where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.").

[12] *Branning v. United States,* 784 F.2d 361 (Fed. Cir. 1986).

ment's attack is pure attorney argument, much is presented without reference to the record, and much is an inappropriate effort to retry the case with positions rejected by the Claims Court, but without mention of the basis for those rejections; and some of the government's statements misinterpret and mischaracterize the record, others simply disregard the Claims Court's expressed credibility determinations, and still others are assertions on which the government submitted no evidence at trial. In sum, the government's attack on virtually every evaluation finding, including those in its favor, totally fails to establish reversible error.

Mindful of the Supreme Court's admonition that an evaluation must be made "in light of all the facts affecting market value" and that inclusion of value elements dependent upon events requires that those events be "fairly shown to be reasonably probable," *Olson v. United States*, 292 U.S. 246, 257 (1934), we have carefully searched the 17 pages of the government's briefs devoted to the evaluation issue and compared them with the record without finding that any of the events involved in the Claims Court's analysis had not been "fairly shown to be reasonably probable". The government's attack on the Claims Court's acceptance of parts of the Boyd plan is merely a statement of those events government counsel thinks would have been reasonably probable—a totally inadequate basis for either reversing or, as the government suggests, remanding this case for a new evaluation.

Contrary to implications in the government's briefs, the Claims Court did not blindly accept the Boyd plan. On the contrary, after careful review, it reduced the forecast of tons per year from 4 to 2.5 million, reduced the market value of Whitney coal

by one-third, and made other findings on specific details that differed from those in the Boyd plan.

The Claims Court's determination that Benefits is entitled to $60,296,000, plus pre-judgment interest from August 3, 1977, is fully supported in the record and is not clearly erroneous.

CONCLUSION

The Claims Court's judgment is affirmed in all respects.[13]

---

[13] The Claims Court's award of attorney fees and costs pursuant to 42 U.S.C. § 4654(c) (1982) is not challenged on this appeal.

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 499-83L

(Filed: October 13, 1989)

WHITNEY BENEFITS, INC., AND
PETER KIEWIT SONS' CO., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

Eminent Domain; Regulation as Taking; Fifth Amendment; Just Compensation; Valuation; Surface Mining Control and Reclamation Act.

OPINION

SMITH, Chief Judge.

This inverse condemnation action was brought by Whitney Benefits, Inc. (Whitney), a Wyoming non-profit, charitable organization and Peter Kiewit Sons' Co. (PKS), a mining corporation organized under the laws of Nebraska. They contend that their property interests in a coal estate in Sheridan County, Wyoming (Whitney coal) were taken by the defendant, and they claim that Whitney's fair market value is $300 million. Defendant contends that no taking occurred because plaintiffs are unable to prove that it would have been economically feasible to mine

Whitney coal, because plaintiffs' mine plan is technologically flawed, and because the plan's valuation is too speculative. For the reasons set forth below, the court enters judgment for the plaintiffs.

FACTS

Whitney was created in 1928 from the estate of Edward A. Whitney. The major asset of Whitney is the ownership in fee of coal underlying 1,327 surface acres of the Powder River Basin in Sheridan County, Wyoming. Whitney coal is divided into two tracts known as East Whitney and West Whitney. A substantial portion of the surface land over these tracts is irrigated or subirrigated Tongue River alluvial valley floor (AVF),[1] which is significant to farming.

In 1973, Whitney received an offer to purchase an option to lease mining rights to Whitney coal. On November 16, 1973, pursuant to Wyoming law governing non-profit corporations, a public hearing was held to consider the proposal and two other bids, including one from plaintiff PKS. PKS was the highest bidder and was awarded the option to mine Whitney coal. PKS immediately exercised its option and, on December 3, 1974, a lease was executed giving PKS the right to mine Whitney coal in exchange for advance and operating royalties.[2] The lease was

---

[1] An AVF consists of stream-laid deposits under and surrounding a river or other waterway. These deposits are permeable and allow water from the river to subirrigate or flood irrigate the surrounding land. This, in turn, makes the fertile surface land surrounding the river ideal for ranching or farming.

[2] Pursuant to the lease, PKS has paid Whitney $581,798.80 in advance royalties covering the period from 1974 to the time of trial. Operating royalties were set at 12.5% and were to be deducted first from the already-paid advance royalties.

amended and extended on November 10, 1979, and remains in effect. Subsequent to obtaining the lease, PKS purchased surface property overlying Whitney coal deposits to afford access to the coal. In 1977, PKS owned approximately 590 surface acres over East Whitney.

In March 1976, after conducting preliminary tests at a cost of $1 million, PKS filed a permit application with the Wyoming Department of Environmental Quality (DEQ) for a surface mine in East Whitney to produce coal from the Dietz 1 coal seam.[3] Although this application was withdrawn in August 1976 for procedural reasons, PKS expressed an intent to refile.

On August 3, 1977, the Surface Mining Control and Reclamation Act (SMCRA) was enacted to:

> assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and [to] strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy; . . . [and]
>
> [to] assist the States in developing and implementing a program to achieve the purposes of this Act.

Pub. L. No. 95-87, § 102, 92 Stat. 448 (1977) (as codified at 30 U.S.C. § 1202(f), (g) (1986)). As a means of achieving these objectives, SMCRA prohibits surface mining without a permit issued by a state's regulatory authority which, in the case of Wy-

---

[3] East and West Whitney contain the Dietz 1A, Dietz 1B, Dietz 2, Dietz 3, Monarch, Carney, and Masters coal seams. A coal seam is a "bed or stratum of coal." *Dictionary of Mining, Mineral and Related Terms* 224 (P. Thrush ed. 1968).

oming, is the Director of Wyoming's DEQ. SMCRA establishes guidelines for the issuance of such permits:

> (b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—. . .
>
> (5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—
>
> (A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the regulatory authority finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production, ...

30 U.S.C. § 1260(1986).

SMCRA has an exchange provision which allows claimants to exchange their coal property for federal coal property if they had made substantial financial and legal commitments before SMCRA's enactment. Under the exchange provision the Secretary of the Interior is

> authorized, in accordance with such regulations as the Secretary may prescribe, to enter into an agreement with that operator pursuant to which

> the Secretary may, notwithstanding any other provision of law, lease other Federal coal deposits to such operator in exchange for the relinquishment by such operator of his Federal lease covering coal deposits involving such mining operations, or pursuant to section 1716 of title 43, 1976, convey to the fee holder of any such coal deposits involving such mining operations the fee title to other available Federal coal deposits in exchange for the fee title to such deposits so involving such mining operations.

30 U.S.C. § 1260(b)(1986).

Plaintiffs believed that the Whitney tracts fell within § 1260(b)(5), and were told by DEQ officials of the federal government [4] that they must file a complete mining permit application and have it rejected in order to obtain the formal declaration of nonmineability required by SMCRA to qualify for the statutory exchange. Thus, in October 1978, plaintiffs jointly filed a second application with DEQ to mine the Dietz 1 seam in East Whitney. On January 15, 1979, the application was denied for procedural reasons. In their denial letter, DEQ found that a large portion of Whitney coal was located under an AVF. DEQ then indicated to the Secretary of the Interior that plaintiffs should be considered for participation in SMCRA's exchange program.

On July 1, 1981, plaintiffs submitted a request to the Secretary of the Interior for an AVF exchange and on August 13, 1981, the Secretary, through the Wyoming State Director of the BLM, stated that

---

[4] Responsibility for management of federal land exchanges is placed with the Department of the Interior's Bureau of Land Management (BLM). 43 C.F.R. § 2200.0-4 (1985).

Whitney satisfied the statutory requirements for an exchange. Since January 1982, the parties have engaged in negotiations concerning the exchange, focusing on a federal coal tract known as Ash Creek. PKS spent $130,000.00 doing test drilling on Ash Creek during late 1983 and through 1984. In May or June of 1983, BLM proposed the Hidden Water Tract as an alternative exchange site. PKS responded that it had mined the area in the late 1940s and early 1950s, and that it was not interested in the remaining coal. Mr. Spencer S. Davis, PKS's Manager of Engineering and Estimating, was involved in the negotiations and did not "recall any specific response or any rebuttal to [PKS's] conclusion concerning Hidden Water. From that point forward, all discussions centered on Ash Creek tract again."

On August 3, 1983, plaintiffs filed a complaint under the Tucker Act, 28 U.S.C. § 1491 (1986), and the Fifth Amendment to the United States Constitution, in this court alleging that the passage of SMCRA had deprived them of all economically viable use of their property. Plaintiffs prayed for just compensation of $300 million, the alleged value of the property on the date of SMCRA's passage, and interest from that date. On November 9, 1983, defendant moved to dismiss plaintiffs' complaint, and on February 2, 1984, in a bench ruling, the court granted defendant's motion. The court held that since SMCRA's exchange mechanism was facially a method for ascertaining and paying just compensation, no taking, and therefore no Tucker Act claim, accrued until such mechanism had failed to provide just compensation.

Plaintiffs appealed that dismissal to the Court of Appeals for the Federal circuit on March 16, 1984. On May 14, 1984, shortly after that appeal was filed,

they instituted a "citizen suit" under 30 U.S.C. § 1270 (1986) in the United States District Court for the District of Wyoming, seeking to compel an exchange. In May 1985, the district court granted plaintiffs' motion for summary judgment, finding there had been unreasonable delay by BLM in performing the exchange, and directing the Secretary of the Interior to "tender coal equal in value to plaintiffs' fee coal pursuant to the provisions of 30 U.S.C. § 1260(b)(5) on August 30, 1985." *Whitney Benefits v. Hodel*, No. C84-193-K, slip op. at 2 (D. Wyo. May 23, 1985). The Secretary filed a notice of compliance with the district court on August 21, 1985, stating that Whitney coal had no present value since BLM's Northwest Regional Evaluation Team (NRET) concluded that surface mining on the property would be uneconomical. Plaintiffs then obtained an order to compel compliance with the exchange provision by January 30, 1986. The deadline, later extended to April 14, 1986, was met by the Secretary's offer, on April 9, 1986, of an exchange of the Whitney property for the Hidden Water Tract plaintiffs had already indicated they did not want.

On January 9, 1985, the United States Court of Appeals for the Federal Circuit reversed and remanded the Claims Court's dismissal. The Federal Circuit held that the mere existence of the exchange provision, a remedy available at plaintiffs' option, did not determine whether or not the statute had effected a taking. The Federal Circuit held:

> the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any

> exchange and pursue a money award under the Tucker Act, 28 U.S.C. § 1491.

Whitney Benefits v. United States, 752 F.2d 1554, 1560 (Fed. Cir. 1985). Therefore, further proceedings were ordered based on the rule in *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), where the court held that summary judgment is inappropriate when there exists a genuine issue as to whether plaintiff had valid mining rights that were prohibited from being exercised by the statute in question. Trial was held in this court and judgment was deferred for the parties to file post-trial briefs and to allow the court to hear argument on those briefs. Further extensions were allowed to consider supplemental authority, including *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986).

DISCUSSION

If the Fifth Amendment is to have any force, courts must determine when and whether government's actions destroy the rights in property that are an essential component of ordered liberty. Just compensation under that amendment is a fundamental component of equal justice under the law. As Justice Story said:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (*quoted in* Dorn, *Introduction: Economic Liberties and the Judiciary*, 4 Cato J. 661, 661 (1985)).

The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. at 164, 176 (1979). Thus, where the government's acts result in the occupation of private land, courts frequently have found a taking. When an alleged taking is due to a statutory or regulatory restriction, however, the issue is more complex and, as is true in many areas of the law, is not resolved by a bright line test. Rather, in determining if a restriction actually results in a taking, the court must consider the facts and circumstances of each particular case and make an ad hoc determination in light of three factors: the economic impact of the restriction on the claimant's property; the restriction's interference with investment-backed expectations; and the character of the government's action. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). *See also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, *reh'g denied*, 439 U.S. 883 (1978).

If the court finds that SMCRA's enactment caused a taking of plaintiffs' property, it further must determine the date of the taking, an appropriate method of valuing plaintiffs' interests, and the legal effect, if any, of SMRCA's exchange provision. Before that becomes necessary, however, the court must begin with an analysis of the three factors described above.

I. The Economic Impact of SMRCA on Whitney Coal

Defendant argues that plaintiffs' coal rights were valueless *ab initio* and that SMCRA's enactment

could not adversely affect already worthless property. Defendant contends that plaintiffs' property was worthless because there was no market for Whitney coal and Whitney coal was not technologically mineable. This court holds, for the reasons set forth below, that there was a market for Whitney coal, that Whitney coal was mineable, and that the enactment of SMCRA had a devasating economic impact on plaintiff's property.

A. Markets for Whitney Coal

The presence of a particular mineral on plaintiff's property does not establish a market for that mineral. *Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12, 34 (1982). Nor, however, does the absence of an ongoing concern establish that a market does not exist. As noted in *Gila River*, "mining in unexplored areas is speculative in nature," *id.*, but it cannot be argued that undeveloped mineral sites have no market merely on the basis that they are undeveloped. The court must weigh the evidence of market conditions as of the taking date to determine whether a market for Whitney coal, with its particular quality and cost characteristics, existed. This question cannot be resolved by any simple formula or legal rule.

Plaintiffs urge than active and rising coal market existed at SMRCA's enactment in 1977; the evidence substantiates this view. Decreased oil consumption and increased alternative energy consumption due to the oil embargo of 1973 is well-recognized. The coal market was a certain beneficiary of the embargo. The energy market share for coal increased from a low of 17% in 1973 to 24% in 1984. 4 *Bold Plan* at

316.[5] Along with the increase in coal consumption, plaintiffs identified two major markets for Whitney coal: utility producers and specialized industrial users.

1. Utility Producers

The primary use of coal is in the generation of electricity. The Boyd Plan indicates that 72% of total electrical production in the United States is fossil fuel oriented, with 76% of the fossil fuel being coal. The Boyd Plan identified the market areas for Powder River Basin coal as electric utilities west of the Mississippi and east of the Rocky Mountains. The Boyd Plan indicated that, within that market area, fossil fuels generate 70% of the total power with 73% of the fossil fuel being coal. The Boyd Plan also identified a primary market for Powder River Basin coal which includes Arkansas, Iowa, Kansas, Montana, Nebraska, Oklahoma, and Wyoming. In these states, Powder River Basin coal represents more than 50% of all coal burned. The Boyd Plan tabulated the breakdown of coal consumption according to its sources. 4 *Boyd Plan* at 3562. It clearly shows a generally increasing market for Powder River Basin coal. For example, it shows that coal consumption in the primary market in which Whitney would compete increased from 12,272,000 tons in 1975 to 78,224,000 tons in 1984. Additionally, the Boyd Plan shows an increase in the total consumption of Powder River Basin coal from 44,901,000 tons in

---

[5] The Boyd Plan was prepared for plaintiffs by the John T. Boyd Company of Denver, Colorado. It is a fair market valuation of Whitney coal based on a Discounted Cash Flow analysis. The Boyd Plan offers several different values for Whitney coal based on a series of alternate dates.

1975 to 148,801,000 tons in 1984. 4 *Boyd Plan* at 362.

The majority of utility plants built before 1978 use cyclone boilers to produce energy and burn the same type of coal as Whitney coal.[6] Although defendant's experts pointed out that no new cyclone boilers are currently being built, there is a continuing need for cyclone-suitable coal to fuel 145 remaining cyclone boilers. These 145 cyclone boilers require approximately 20 million tons of Whitney-type coal per year. A Whitney mine would have been in a good position to compete for coal in this 20 million tons per year market had its development not been halted by SMCRA's enactment.

As support for the ongoing demand, plaintiffs point to a contract between Northern Indiana Public Service Company and the Carbon County Coal Company. That contract for the Schahfer 14 boiler calls for 11,000 Btu/lb.[7] coal at $24.00 per ton. Plaintiffs maintain that after adjustments for Btu content and transportation differences, a comparable price for Whitney coal would be $14.00 per ton. It is the court's understanding of the coal market that many, if not all, of the contracts are interchangeable among purchasers and producers provided that basic quality and price demands are met. Because Whitney coal is close to transportation and is of high quality, it could compete for contracts in these markets.

---

[6] Cyclone boilers burn low ash fusion and low sodium coal.

[7] "Btu" stands for British thermal unit. One Btu is equivalent to the heat needed to raise one pound of water 1 degree Fahrenheit, or 252 calories. *Dictionary of Mining, Mineral and Related Terms* 142 (P. Thrush ed. 1968). In general, the higher the Btu, the better the grade of coal.

Defendant asserts that the Boyd Plan ignored the historical market for Sheridan County coal and created an illusory market based upon demand for low-cost coal outside of the relevant area. This contention is premised on the cost dichotomy between Eastern Powder River Basin coal and Western Powder River Basin coal. Clearly, the existing mines in the Eastern Basin have a lower stripping ratio than Sheridan County mines.[8] The Big Horn mine in Sheridan County has a 5-to-1 ratio, while the average for assigned reserves of Whitney coal would be 4.38-to-1, according to the Boyd Plan.[9] Mines located in the Eastern Basin, however, have stripping ratios ranging from a low of 1-to-1 at the Buckskin and Fort Union mines in Campbell County, Wyoming, to a high of 3-to-1 at the Dave Johnson mine located in Converse County, Wyoming. According to the defendant, the existing market in the 1970s and 1980s was for low stripping ratio/low cost Eastern Powder River Basin coal, rather than higher cost Western Powder River Basin coal.

---

[8] The stripping ratio is the ratio of tons of earth and rock lying on top of the coal seam per ton of recoverable coal. The higher the stripping ratio, the more expensive the coal is to mine. This is because more overburden (earth, rock, etc.) must be removed to obtain the coal. In strip mining, the removal of overburden is one of the key cost elements.

[9] Included in the Boyd Plan's calculation of this stripping ratio was the assumption that the production level would be 4 million tons per year. For reasons stated elsewhere in this opinion, the court has concluded that the production level ratio, since logically the most accessible of the Whitney coal would be mined first. The court's own calculations, based on the annual stripping ratios set forth in the Boyd Plan, estimate that the average stripping ratio at an annual production level of 2.5 million tons would be 4.14-to-1.

Contrary to defendant's argument, plaintiffs put on evidence indicating that the higher price of Sheridan County coal is offset by its higher quality. Sheridan County coal has one thousand Btu's per pound more than Campbell County coal. Additionally, the low ash fusion temperature and low sodium content of Whitney coal makes it ideal for the cyclone boilers prevalent in midwest utilities. Plaintiffs also put on evidence of a 7 million tons per year contract between the Spring Creek Coal Mine and Houston Mining and Power Company. According to plaintiffs' expert, Mr. David J. Morris, the Houston Mining and Power contract price escalated to $19.00 per ton in 1985-86. Additionally, a mine of Whitney coal could have competed for Big Horn's contract with Commonwealth Edison. That contract was entered into in 1978 at $14.60 per ton and escalated by 1986 to over $30.00 per ton.

While the court does not agree with plaintiffs' estimate of a 3 million tons per year utility market for Whitney coal, the court is convinced that plaintiffs have proven a market for 2 million tons of utility coal destined for the cyclone boiler market. Plaintiffs' expert testimony and its market data convince the court that a substantial market existed in 1977 and will continue to exist for the life of the 145 currently existing cyclone boilers.

2. Industrial Users

The industrial coal market requires high Btu, low sulfur coal, and specialized loading and sizing facilities at the mine. Plaintiffs argue that Whitney coal is suitable for the industrial market.[19] Plaintiffs sup-

[19] For an explanation of the various coal markets, see *infra* note 14 and accompanying text.

port this contention by noting that the Spring Creek Mine, located just across the Montana border from Whitney, supplied 1 million tons per year to industry. Defendant gratuitously asserts that Whitney could not compete with Eastern Powder River Basin mines or the Montana mines. The Montana mines are located within a few miles of the Whitney property and have only slightly lower stripping ratios than Whitney.[11] Defendant makes light of Spring Creek's 1 million tons per year industrial coal contract. Defendant argues that since the Spring Creek mine was not opened until 1980, a prudent buyer would not base 1977 market estimates on 1980 sales. Further, defendant asserts that Spring Creek has a competitive advantage because the land was leased from the federal government at $1.00 per acre.

The court cannot agree with defendant's arguments. Spring Creek's contract is a specific example of a potential market for Whitney coal. Whitney coal is qualitatively competitive with Spring Creek coal. Production of Whitney coal may be slightly more expensive per ton due to higher stripping ratios, but it is doubtful whether such a marginal increase in stripping ratios, and thus price, would take Whitney completely out of the market. The fact that Spring Creek was not opened until 1980 does not affect the outcome here. As the court understands it, Whitney, in the absence of SMCRA, would have become fully operational in about 1980. It would be illogical to argue that Whitney had no market in 1980 merely because Whitney was precluded by SMCRA from beginning operations. The real point is that Whitney

---

[11] The Montana mines' stripping ratios range from 3-to-1 to 4-to-1, while Whitney's stripping ratio, as stated earlier, would average 4.38-to-1.

would have had an industrial market for its coal had it been open in 1980. The undisputed fact that Spring Creek negotiated an industrial coal contract for 1 million tons per year clearly shows that a market did exist in 1980.

While the court agrees with plaintiffs that a specialized market for Whitney coal did exist in 1977, it declines to hold that this market potential was 1 million tons per year. On the other hand, Whitney coal does have particular attributes attractive to industry. Therefore, the court finds based upon all the evidence that a market existed for 500,000 tons per year of industrial coal.

B. Ability to Mine Whitney Coal

Defendant contends that the planned diversion of the Tongue River would not be adequate to contain the river flow, that plaintiffs made no plans to dewater the alluvium under the bed of the Tongue River, and that the only way to economically mine the property is to acquire substantial surface acreage in addition to the 590 acres already owned by PKS. In addition, defendant asserts that state regulatory restraints would preclude mining of Whitney coal and that Whitney could not function as a stand-alone mine.[12] As we explain below, defendant's contentions have little merit.

The Boyd Plan notes that, to divert the Tongue River, a concrete structure would be used to avoid raising settled solids and a flood berm would be constructed parallel to the diverted river. The berm would prevent high water from running off into the

[12] A "stand-alone" mine is one which can operate without the assistance of another nearby mine. A "captive" mine requires the facilities of a separate nearby mine to mine its coal.

mine pit, and would prevent pit runoff from flowing directly into the river. Defendant takes issue with this plan. Nothing presented to the court showed why plaintiffs' plan was not feasible. The general evidence presented by plaintiff showed a technically workable plan. The court is of the opinion that this particular issue does not affect the mineability of Whitney coal. It is reasonable to assume that plaintiffs' engineers, with the cooperation of DEQ, could create a plan which would adequately contain the river. Plaintiffs' expert, Mr. James Bowlby, testified that it is standard operating procedure for DEQ to sit down with companies whose mine plans are rejected in order to overcome any obstacles to mining. The court finds his testimony reliable and credible.

Defendant contends that plaintiffs did not adequately plan to dewater the alluvium. Plaintiffs' expert, Mr. Richard L. Bate, testified credibly on cross-examination that water from the alluvium will eventually flow into the pit itself and be pumped out in the normal course of mining. Mr. Bate also estimated a two-year period for dewatering the alluvium and other aquifers. The court is of the opinion that dewatering an area is a normal feature of surface mining and needs no preconceived plan of action, nor did it in this case present any unusual obstacles. Plaintiffs adequately showed dealing with alluival water as a mining cost and that it would be taken care of in normal mine operations. Their evidence showed it was not a major technical problem and took appropriate account of it in determining the mine's economic viability.

Defendant contends the acquisition of additional surface acreage would have been necessary for the operation of a Whitney mine. Plaintiffs admit this, but maintain such acquisitions are a normal part of

any mine operation. The Boyd Plan allotted $1.9 million for the purchase of 2,200 surface acres on which to store overburden and over which to temporarily divert the Tongue River. Defendant maintains that the acquisition of additional surface lands was not feasible because owners of the surrounding land would be reluctant to sell or would demand exorbitant prices. Plaintiffs' experts, Messrs. Bate and Morris, both gave convincing testimony that the purchase of adjacent surface rights was commonplace in the mining industry. According to both witnesses, alternative, though not optimal, plans could be developed should additional surface acres be unavailable. Difficulty in obtaining surface areas may mean that less coal could be economically mined from Whitney, but such difficulty would not have precluded mining. In fact, plaintiffs' witnesses' testimony indicated that the only essential parcel of property would be that connecting the Whitney coal to the railroad; plaintiffs' experts said that such property traditionally is available to and acquired by mining companies. The court finds that acquisition of additional surface areas was within the realistic scope of the Boyd Plan and would not have presented a barrier to the mining of Whitney coal.

Defendant argues that plaintiffs could not have obtained a permit to mine Whitney coal. Defendant maintains that Wyoming has never permitted as lengthy a river diversion as that contemplated by the Boyd Plan, and that a reasonable purchaser would not assume the risk of such a contingency. Defendant's contention has little merit. Merely because Wyoming never has allowed such a river diversion does not mean that it would not have approved plaintiffs' planned diversion. Plaintiffs' evidence clearly shows that Wyoming frequently allows river diversions, one

of which, by necessity, must be the "longest" diversion. There is nothing to suggest that Wyoming would disapprove this one.

Plaintiffs' expert, Mr. Bowlby, is a hydrologist employed by PKS, and has firsthand knowledge and experience in obtaining mine permits for PKS. Mr. Bowlby testified that after a permit is submitted, DEQ typically provides a lengthy response detailing deficiencies in the plan. Normally, the response is followed by a discussion between plan developers and DEQ. The developers then attempt to satisfy DEQ's problems with their plans. In Mr. Bowlby's experience, permit applications are not rejected outright, but are subject to a process of give and take designed to protect the state's position, and yet allow developers to proceed to cure their plan's deficiencies.

It is clear to the court that the Boyd Plan is a proposal only, rather than a rigid final design. It includes several alternatives, with the optimal choices highlighted. Thus, if plaintiffs were forced to proceed on a course other than the optimal, their costs would go up, but mining would not be precluded.

Defendant also contends that any mine on Whitney would be a captive mine. Defendant argues that a Whitney mine could not function independently of the Big Horn mine, and therefore has no value on its own. The court does not agree. The court previously has found there to be a 2.5 million tons per year market, which is adequate to support a stand-alone mine. Evidently, defendant bases its assumption that Whitney could only operate as a captive mine on plaintiffs' proposed 1978 and 1983 mine permit plans. In those plans, PKS planned to use the nearby Big Horn mine as its base of operations for mining Whitney. As the court has stated, PKS's mine permit plans are not controlling. The court

must look at plaintiffs' land from the perspective of an independent, knowledgeable, and willing buyer who would develop its own unique plan to mine the property. Although it might be more economical to mine Whitney in conjunction with the Big Horn mine, plaintiffs' expert, Mr. Bate, testified that Whitney could operate as a stand-alone mine, much as Big Horn. The court is of the opinion that Whitney, much like Big Horn (which has the same quality of coal and 2 million tons per year in contracts), could economically operate as a stand-alone mine with as little as a 2 million tons per year market for its coal. This is based on Mr. Bate's testimony, the absence of evidence to the contrary, and logical inference.

It is clear to the court that Whitney coal is economically, legally, and technologically minebale, and therefore valuable. Although the court does not agree entirely with the Boyd Plan's dollar valuation of the property, it is compelled to agree that the property has substantial value. In the valuation section of this opinion, the court will determine the actual dollar amount by which plaintiffs' property was diminished.

II. Interference with Investment-Backed Expectations

Plaintiff PKS made a significant developmental investment in Whitney coal. PKS paid Whitney $582,798.80 in advance royalties for the right to mine Whitney coal. In addition, PKS spent at least $1.5 million for land studies of the property and the permit applications. Prior to and during development of the plaintiffs' Boyd Plan, a substantial amount of data concerning the quantity and quality of Whitney coal was assembled from test drilling 102 holes. The data from these 102 drill holes, accompanied by the

actual mining experience of PKS, provided the Boyd Company with a sound picture of the actual coal on Whitney property. The information developed from the test holes indicated approximately 191,688,000 tons of in-place coal, not all of which is recoverable.[13] Recoverable coal was estimated at 143,017,000 tons. Of that amount, the Boyd Company determined that it would be optimal to mine 81,640,00 tons of assigned reserves at a value to the mine operator of $1.013 per ton, with 61,377,000 residual tons valued at $0.203 per ton. Given the extensive site testing done by PKS, its market evaluation, and cost analysis, we find that investors reasonably could expect the returns on their investments in Whitney coal that the Boyd Plan sets forth. There is no reason in fact or law why a knowledgeable investor would have considered Whitney coal a bad investment in 1977.

III. Character of Government Action

A constitutional taking can be found absent a physical invasion when a government act denies the owner all "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In the case at hand, there was no physical invasion of plaintiffs' property, but SMCRA effectively denied plaintiffs all economically viable use of their coal property. Defendant argues that other uses for the Whitney property exist. According to defendant, SMCRA

---

[13] In the process of surface mining, some in-place coal is lost as extra overburden is removed.

The Boyd Plan breaks Whitney coal down into four classes: (1) *Total Coal Resources*—coal in place in the ground; (2) *Total Coal Reserves*—all mineable coal; (3) *Assigned Reserves*—the most economical coal to recover; and (4) *Residual Reserves*—mineable, but more expensive coal which usually would be mined only if coal demand increased substantially.

only affected one strand of plaintiffs' bundle of property rights, thereby leaving plaintiff the right to underground mine, the right to explore and mine other minerals, the right to ranch and farm, and the right to exchange Whitney coal for valuable federal coal. This court holds, for the reasons set forth below, that there are no economically viable alternative uses for plaintiffs' property.

There is little evidence to refute plaintiffs' contention that underground mining of Whitney coal is economically and technologically unfeasible. Plaintiffs' expert, Mr. Morris, testified that underground mining was not economically competitive with strip mining. Plaintiffs' other expert, Mr. Bate, testified that two serious problems would thwart any attempt to underground mine Whitney coal. First, any significant subsidence of the surface area around the river, as is likely in underground mining, would turn the AVF into a swamp. Second, faulting and the hydrologic connections between the river and underground voids would be likely to result in such a substantial amount of water entering the mine that it would be difficult, if not impossible, to remove it.

As evidence that underground mining would be feasible, defendant points out that underground mining was done in Sheridan County by the Pittston Company up until 1952. The Monarch Seam on the Hitson-Schreibeis property once was underground mined, and there had been underground mines near the Big Horn mine. Defendant's argument fails to recognize that these properties are not under AVF's and therefore are not subject to the technological problems which would make an underground mine on Whitney unfeasible. Plaintiffs have shown that underground mining is not feasible on Whitney. This property is unique because of its situation near and

under the Tongue River. The court understands that underground mining would be exceedingly difficult, if not impossible, in such a situation, and the experts' credible testimony strongly supports this.

Defendant additionally contends that plaintiffs own the rights to mine minerals other than coal on their property. While it is true that plaintiffs do own mineral rights on some Whitney coal property, the record indicates that there are no such valuable minerals, nor oil and gas, on the property in question. Mr. Morris testified that all of the test drilling, except for a small gas field six miles northwest of Whitney coal, resulted in dry holes. There is no evidence in the record that plaintiffs' property at issue in this case contains any valuable resource other than the coal which they are precluded from mining. Defendant's bald assertions do nothing to persuade the court otherwise.

Defendant also contends that PKS has a valuable property right in farming and ranching the surface property. Defendant's contention is completely off the mark. Plaintiffs argue that SMCRA effected a taking of their coal *rights* to the property, not the surface rights which were bought by PKS only to facilitate mining. There is no question that Wyoming recognizes separate mineral and surface estates. *Williams v. Watt*, 668 P.2d 620, 624-25 (Wyo. 1983), and that mineral rights are property subject to the Fifth Amendment's taking clause, *see Skaw*, 740 F.2d at 935-36. Because plaintiffs are claiming only that defendant took their coal rights, and not their surface rights, consideration of surface rights bought to facilitate the mining of Whitney coal as part of plaintiffs' bundle of property rights is not warranted.

IV. A Taking under the Fifth Amendment

The precedent by which this court is bound teaches that in order to decide when a governmental action becomes a taking of property, the trial court must balance two quantities. The Supreme Court has stated that:

> The determination that governmental action constitutes a taking is, in essence a determination the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interest.

Agins, 447 U.S. at 260-61 (citations omitted).

On one side of the scale is the governmental and public interest in the action in question. Historically, whenever that governmental or public interest is directed at preventing a classic nuisance, this side of the scale almost automatically decides the issue. *See, e.g., Mugler v. United States*, 123 U.S. 623 (1887). When a nuisance is not involved, when the court must also look to the other side of the scale. *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). In that side of the balance the court must place the burden, in both absolute and relative terms, placed upon the holder of the property rights at issue. The outcome of the balancing does not relate to whether Congress may "take" the property in question. Rather, it answers the question: May Congress or the United States burden the instant property without just compensation?

This case presents a dispute where a proper government purpose, protecting agricultural land, must

be balanced against the absolute diminution in value of the property at issue that the court has found. Logically, when a diminution in value is absolute, a taking is more easily found.

Defendant cites to the court such cases as *Mugler*, and *Miller v. Schoene*, 276 U.S. 272 (1928), which expressed the view that an exercise of police power can never result in a taking. Those cases largely are limited to a narrow set of facts. This court, relying on modern Supreme Court cases, has noted that taking law has progressed much since *Mugler* and "it is no longer asserted that a regulation, by its very nature as a regulation, cannot be an exercise of eminent domain." *Florida Rock*, 791 F.2d at 900.

In the case at hand, the diminution in property value is total, and there is no public interest in causing the plaintiffs to solely bear the burden of maintaining the AVF protected by SMCRA. The court finds that SMCRA's enactment took plaintiffs' property.

V. Date of the Taking

Having determined that a taking has occurred, the court must find the value for which plaintiffs is to be compensated. The first inquiry necessarily involves establishing the date on which the taking took place. In this regard, "the time when economic development [is] effectually prevented [is] the date of the taking." *Whitney*, 752 F.2d at 1559. Thus, this court must determine under the fact of the present case when the economic development of Whitney coal was precluded by SMCRA.

Plaintiffs argue that defendant took their property on August 3, 1977, the date SMCRA became effective. Such a result follows, say plaintiffs, because SMCRA was clearly intended to affect the Whitney property.

Although defendant publicly has admitted that the "[d]evelopment of the [Whitney] coal was halted by the passage of [SMCRA]," Notice of Realty Action, 51 Fed. Reg. 3124, 3125 (Jan. 28, 1986), defendant would have us date the taking, at the earliest, in 1983 when the DEQ officially determined that East and West Whitney were located under an AVF.

Plaintiffs argue that SMCRA from its very inception had been intended to affect Whitney coal, and an official denial of plaintiffs' permit application was a mere formality which should not prevent this court from finding a taking at the time of enactment. In support of their position, plaintiffs cite a portion of the Congressional Record at which the application of SMCRA to the Whitney property was discussed. United States Representative Teno Roncalio of Wyoming said:

> Category 3 consists of mines with no state permits but which may be grandfathered under test of paragraph (3) if the Secretary [of the Interior] determines that they have made "substantial financial and legal commitments" . . . prior to January 4, 1977. This list includes the very highly controversial Whitney Benefits' mine on the Tongue River in Sheridan County in Northern Wyoming.

95th Cong., 1st Sess., 123 Cong. Rec. 12638 (1977). Plaintiffs assert that Representative Roncalio's statement illustrates that Congress intended SMCRA to prevent the mining of Whitney coal. SMCRA's proposed grandfather clause specifically would have let plaintiffs mine Whitney coal because their property was enumerated in the list of properties the clause was intended to cover. Unfortunately for plaintiffs, the grandfather clause was removed before the stat-

ute was enacted to prevent the mining of the enumerated properties. Since the grandfather clause was intended to cover Whitney, and since it was removed in order to prevent the mining of Whitney, this court logically must find that SMCRA was intended to affect Whitney coal.

Defendant asserts that plaintiffs' property could not have been taken until their application for a mine permit actually was denied as a result of SMCRA's prohibitions. This normally would be the case, although such application would not be required when it clearly would be futile. *Cf. Conant v. United States*, 12 Cl. Ct. 689, 692 (1987) ("it would serve no purpose to require claimant to exhaust administrative procedures before seeking judicial review when it is clear that resort to administrative action would be futile"). *A fortiori*, when a statute is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted. The denial of plaintiffs' mine permit was a mere formality that will not prevent this court from finding an earlier taking date. It makes little sense for Congress to pass SMCRA with an intention that it apply to plaintiffs' property and then for defendant to require plaintiffs to obtain an official determination that SMCRA applied to their property before a taking could occur. Congressional intent as to the Whitney coal was abundantly clear when it passed SMCRA. Plaintiffs' property was taken at its enactment. Defendant argues that Representative Roncalio's statement before the House of Representatives is not determinative of congressional intent that SMCRA should cover Whitney coal. While this may be the case, it is evidence that a

formal administrative determination was not needed for plaintiffs taking claim to be ripe.

Finally, defendant cites several cases, including *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *Agins*, and *Florida Rock*, as standing for the proposition that the mere enactment of a statute cannot be a taking. Notwithstanding defendant's representations to the contrary, at a minimum these cases do not diminish this court's decision that the taking occurred August 3, 1977. More directly, they support the court's present finding that the enactment of a statute *can* result in a taking when, as in the instant case, it deprives a party of all economically viable use of its land.

VI. Valuation of Whitney Coal Estate

When private property is taken for a public purpose, the Constitution requires the taker to pay the owner "just compensation" and imposes on the court the duty of determining what compensation is just. *Almota Farmers Elevators & Warehouse Co. v. United States*, 409 U.S. 470 (1973). The Supreme Court has determined that "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same financial position as if there had been no taking. *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970); *Houser v. United States*, 12 Cl. Ct. 454 (1987). However, the value of the property taken is not the value to the owner for his particular purposes. The sovereign must pay for what it takes, not for opportunities the owner loses. *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

The fair market value of the property at the time of the taking has become the accepted criterion for

determining just compensation. *See Foster v. United States*, 2 Cl. Ct. 426 (1983). The Supreme Court has defined fair market value as:

> The amount that a willing and informed buyer of mining properties, under no compulsion to buy, will pay, and what a willing and informed owner, under no compulsion to sell, will accept for property, after fair and voluntary dealing, and taking into account all those factors which such willing and well informed persons would consider regarding the property in light of the custom of the industry.

United States v. Miller, 317 U.S. 369, 373-74, *reh'g denied*, 318 U.S. 798 (1943).

Appraisal experts employ several generally-accepted methods of valuing real estate. The traditional and most frequently-used method, the comparable sales approach, uses sales and purchase of properties that reasonably resemble the subject property with respect to time, place, and circumstances. Defendant urges the court to use this method. Plaintiffs urge the court to adopt its Boyd Plan, which employs an often-used method incorporating the discounted cash flow (DCF) approach, valuing the property based on the discounted stream of income the property is capable of producing over its useful economic life. For the following reasons, this court will use the Boyd Plan in determining the fair market value of Whitney coal.

A. Comparable Sales

Defendant asserts that plaintiffs inadequately searched for comparable sales and "refused to reveal" existing comparable sales. Defendant offers no evidence to support its allegation that plaintiffs refused

to reveal existing comparable sales. Moreover, defendant asserts that the sale of the Hitson-Schreibeis tract is a comparable sale by which to value the property in dispute. The defendant is in error; the Hitson-Schreibeis tract is dissimilar in site and physical circumstance to the Whitney property.

In order for a comparable sales analysis to work, the sale to which the property at hand is compared must not have been sold out of necessity or compulsion. *See Miller*, 317 U.S. at 373-74. Far from being "willing but not obligated to sell," the owners of the Hitson-Schreibeis tract had little choice but to sell to Big Horn. Initially, Mr. Morris, testified that the Hitson-Schreibeis tract is a small bypass tract adjacent to Big Horn. He explained that because of the site of the tract and the physical circumstances of the property surrounding it, the Hitson-Schreibeis tract never would be mined unless Big Horn mined it, but Big Horn could just as well bypass the tract and continue mining beyond it.

In addition, a substantial amount of the coal underlying Hitson-Schreibeis has been burned or mined. Plaintiffs' expert testified that a "substantial and unmeasurable portion of the reserve had been burned out by a fire that had been raging underground for years, consuming the coal in the Monarch seam under part of the tract." He also testified that underground mining had taken place on the tract years ago, removing much of the coal; surface subsidence rendered surface mining on the remaining seams very difficult. It became apparent at trial that defendant's experts were not aware of those facts about the underlying transaction when they decided to urge Hitson-Schreibeis as a comparable sale. Therefore, on the basis of these facts adduced from the record concerning the

sale of the Hitson-Schreibeis tract, we find that the transaction cannot be used as a comparable sale in evaluating the Whitney property.

B. The Boyd Plan as a Method for Determining Fair Market Value

The Boyd Plan uses a DCF analysis based on the capitalization of Whitney's projected income stream to value Whitney coal. The court finds for the reasons set forth below, that the Boyd Plan offers a reliable mdethod for determining the fair market value of Whitney coal on the date of taking.

1. Capitalization of Business of Profits and Speculative Damages

Defendant contends that the Boyd Plan represents an inappropriate attempt to determine the fair market value of Whitney coal based on the capitalization of business profits. It relies on *General Motors Corp.*, and argues that this DCF method is impermissible because it includes a component of value attributable to the leasehold owned by the mine operator, PKS, and represents a valuation of "lost profits." In support of this conclusion, defendant cites *Cloverport Sand & Gravel Co. v. United States*, 6 Cl. Ct. 178, 191 (1984), which states, in pertinent part:

> [T]he Court must draw a distinction between the capitalization of income generated by the property itself and income derived from a business conducted on the property. Federal courts have frequently criticized and rejected valuations based on the capitalization of profits as being uncertain and speculative. Profits derived from business activities depend to a greater extent

> upon the amount of capital invested and the good fortune, business skill and management with which the business is conducted than upon the land itself.

(citations omitted). Defendant asserts that the Boyd Plan compensates PKS's leasehold interest and therefore is nothing more than the mere capitalization of business profits.

In place of the Boyd Plan, defendant offers two royalty stream valuations which it asserts represent the value of Whitney Benefits' interest as lessor under the 1974 leave. The first is embodied in a six-page report by the NRET dated April 8, 1986. The second is contained in a three-page letter from defendant's expert, Mr. Weir, dated April 7, 1986. Both of these valuations are based on the same basic assumptions. Rather than value the Whitney coal as a fee interest of the two plaintiffs as lessor and lessee, defendant's valuations focus only on the interest held by Whitney Benefits. Thus, in both of its valuations, defendant has disregarded the leasehold interest owned by PKS and merely has analyzed the royalty income Whitney could have expected to receive under its 1974 lease had SMCRA not prohibited surface mining of the property. This is clearly a misapplication of eminent domain law. This is not a lost profits case. This case involves coal reserves, the value of which can be measured only by their ability to produce income. Simply stated, an operator's interest in a mineral estate is a compensable property interest. *Foster*, 2 Cl. Ct. 426. As the court in *Foster* explained, "the value placed on an operator's interest is not compensation for the consequential damages of lost business profits; it is compensation for the taking of an interest in real property." *Id.* at 449.

Further, defendant relies on cases in which plaintiffs sought to be compensated for decreased profits from their businesses, as well as diminution in the value of their property. In *General Motors*, 323 U.S. at 379, for example, the Court held that:

> just compensation for the taking of property does not include the future loss of profits, the expenses of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensure the sale of the property to someone other than the sovereign.

Accord Mitchell v. United States, 267 U.S. 341, 344-45 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675 (1923). The case at hand involves coal reserves, the value of which can only be measured by their ability to produce income. Lost profits, on the other hand, would be compensation for value added to the property taken by the plaintiffs' location and goodwill, their management skill, and all the potential risks and opportunities that make up the concept of profit. Thus, plaintiffs do not seek lost profits as consequential damages, as did the plaintiffs in *General Motors*, *Joslin*, and *Mitchell*. Instead, they seek the value of their coal which is measured by the dollar amount for which they could sell it.

Defendant also contends that DCF methods based on capitalization of income are too speculative. Defendant points out the impossibility of determining, before actual mining, precisely how much recoverable coal a tract contains and whether it could in fact be mined profitably. Although these uncertainties are undeniable, the Supreme Court has explained that:

> Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such "prospect" has a market value; and the absence of certainty is not a matter which the railroad company can take advantage, when it seeks to enforce a sale.

Montana Ry Co. v. Warren, 137 U.S. 348, 352 (1890).

There may be some uncertainty in any estimate of Whitney coal reserves, but that should not prevent this court from valuing plaintiff's coal. There is a market for it and the evidence shows that a substantial amount lies beneath the surface. It certainly would undercut the protection of the Fifth Amendment if the Government could rely on the consequence of its taking a property to claim that compensation is speculative. Such an approach would turn the Fifth Amendment on its head.

Finally, it is interesting to note that the royalty stream method of valuation offered by defendant is as speculative as the DCF income capitalization method offered by plaintiffs. Moreover, defendant's expert, Dr. John Weir, testified that the royalty stream valuation method is really a subset of DCF analysis. Both the income stream and royalty stream methods require the court to adopt an estimate of the tons of coal per year that the mine will produce, the cost of mining the coal per ton, the market price of the coal per ton, and the life span of the mine. The most important difference between the two is that the royalty stream method does not take into consideration the value of PKS's leasehold, a factor defendant asserts only would be relevant in determining lost profits, which would be improper for this

court. As previously stated, the court does not agree with the defendant's characterization of this claim as one for lost profits. For reasons previously stated, the court rejects this line of reasoning, as well as the royalty stream method.

2. The Annual Production Rate

On the basis of an independent analysis of the 1977 coal market, the Boyd Plan concluded that a willing buyer of Whitney would have anticipated a production of 4 million tons of coal per year. Defendant's experts take issue with this conclusion, arguing that the coal market could not have supported an annual production of 4 million tons. They further argue that plaintiffs' 1977 production rate is based on the unproven assumptions that a knowledgeable purchaser of Whitney reasonably would assume that it could: secure a long term utility coal contract at $13.50 per ton for 2 million tons of coal per year; secure a market for 1 million tons of industrial coal, and sell 1 million tons of coal on the spot market. As stated earlier, this court finds that such purchaser likely could secure utility coal contracts for 2 million tons of coal per year and industrial coal contracts for an additional 500,000 tons.

3. The Price of Whitney Coal

In its Plan, the Boyd Company performed a full, independent analysis of the 1977 coal market and concluded that a willing buyer would have assumed that it could sell Whitney coal for $13.13 per ton. This result was confirmed further by the Boyd Company's review of published coal price quotations and of other actual coal sales transactions in 1977.

According to the Boyd Plan, a prudent purchaser of Whitney coal reserves would attempt to sell coal in four distinct markets: utility contract, utility spot, industrial-ROM, and industrial-sized.[14] The Boyd Plan estimated coal prices for each of these segments in 1977 as follows:

FIGURE 1

COAL PRICES BY MARKET

Market	Tons (000's)	Price $/ton
Utility Contract	2,000	$13.50
Utility Spot	1,000	$12.00
Industrial-ROM	500	$13.00
Industrial-Sized	500	$14.00
Average		$13.13

Defendant disagrees with the Boyd Plan's price estimates and urges that a maximum price for Whitney coal in 1977 was only $10.50 per ton. Defendant's figure is based on Dr. Roy Allen's testimony that in 1977 coal from Whitney could not be sold at $13.13 per ton and could not successfully compete

[14] The nature of the markets may be summarized as follows: *Utility contract:* Utility steam coal under long-term contracts. This is the anchor segment of production and would represent a minimum of 50 percent of the output from a projection of this type. *Utility Spot:* Utility steam coal on a short-term or a spot sale basis. This section of the market would account for 25 percent of total output. *Industrial-ROM:* Large scale industrial users with boilers using pulverizers or modified stokers capable of using a crushed but not sized run-of-mine (ROM) coal. This would constitute 12.5 percent of the projected market. *Industrial-Sized:* Smaller-scaled industrial or institutional consumers that require a sized product for stoker use and that generally pay a higher coal price. This would constitute 12.5 percent of the projected market.

with coal from the Eastern Powder River Basin. Dr. Allen performed no survey and relied almost entirely on an industry publication known as *Coal Week*.[15] According to Dr. Allen, *Coal Week* showed an August 1977 price of $7.00 for Eastern Powder River Basin coal and $8.00 for Montana coal. Dr. Allen averaged these two prices, made adjustments for differences in the Btu values, and arrived at a figure of $9.00 per ton. He then added $1.50 to that figure to reflect "optimism," and concluded that the proper price a willing buyer in 1977 would have expected to receive for Whitney coal was $10.50.[16]

The *Coal Week* marker price offers a good starting point when trying to determine the price for coal; however, it should not be used alone when using a DCF method. Coal reserve quality, proximity to intended market, and proximity to transportation net-

---

[15] *Coal Week*, a weekly trade publication published by McGraw-Hill, Inc., reports regional "marker" steam coal prices on a bi-weekly basis. The prices published by *Coal Week* are meant to be representative of those within a specific coal producing region for a coal with given quality specifications. These prices are adjusted when applied to coal quality differing from the norm.

[16] As developed during the cross-examination of Dr. Allen, a more thorough review of *Coal Week* provides substantial support for the Boyd Plan's $13.13 price. After examining the various reported prices and comparing the Btu content and location of the coal for which the magazine gave marker prices, it is the court's conclusion that Dr. Allen's estimates were too low to reflect the actual published price for Sheridan County coal. Moreover, if the $12.50 Sheridan County price is adjusted according to *Coal Week's* recommended method ($0.20 per 100 Btu) to account for the 200 Btu/lb. differential between the 9,100 Btu/lb. reported coal and Whitney's 9,300 coal, the resulting price is nearly $13.00. *See* 4 *Boyd Plan* 1-334, 335.

works vary too widely to use *Coal Week* without a more in-depth review of the market place. Prior to April 1976, *Coal Week* combined Montana and Wyoming coal prices at $7.50 per ton for 9,500 Btu/lb. coal. Beginning in April, they were separated, with Wyoming showing $11.00 per ton for 9,300 Btu/lb. coal and Montana showing $7.75 per ton for 9,600 Btu/lb. coal. Although the heating value of Montana coal was greater, the coal quality, particularly ash fusion temperature, sodium content, and location certainly had a major impact on coal prices.

By mid-1977, as the new Gillette area mines became operational, *Coal Week* published prices for that area and for the Hanna Basin in southern Wyoming, but eliminated Sheridan County prices from its pages to protect confidential data from the single major producer in that area. In May 1977, the last month that *Coal Week* reported Sheridan County coal, the price was $12.50 per ton for 9,100 Btu/lb. coal, while the Montana price was $8.00 per ton for 9,000 Btu lb. coal. The Montana price increased gradually until early 1980 when it stabilized at $12.00 per ton, where it remained through 1985.

As a back stop to price quotations in trade journals, market transactions are the next best evidence of price. A willing buyer would have looked to the price of coal at the nearby Big Horn mine when estimating the price he could receive for Whitney coal. Plaintiffs' expert, Mr. Morris, explained that the appropriate price for Whitney coal was confirmed by sales which occurred between Big Horn and Commonwealth Edison in 1977 and their long-term contract signed in 1978. Big Horn sold its coal to Commonwealth in 1977 for $14.52 per ton. In 1978, Big Horn concluded a long-term contract with Commonwealth at $15.41 per ton. 4 *Boyd Report* at 1-325. While

the prices quoted in *Coal Week* were slightly lower than prices received by Big Horn, they confirm the Boyd Plan's view that a willing buyer would have expected to pay between $13.00 and Big Horn's $14.52 for Whitney coal. The Boyd Plan's $13.13 price is conservative when compared to the price of coal at Big Horn during the same time period, and is at the lower end of the price spectrum as established by the record. The court finds the appropriate average price for Whitney coal to be $13.13 per ton as supported by plaintiffs' evidence and expert testimony.

4. The Discount Rate

Plaintiffs' expert witness, Mr. Morris, explained that the Boyd Plan utilized a 10% discount rate in its analysis of the fair market value of the Whitney property. The Boyd Company discounted the cash flows derived from its cost, price, and production data to a 1977 value by applying a 10% real after-tax discount rate. Boyd based its application of a 10% discount rate on the fact that, for the purposes of evaluating coal reserves, the rate generally applied in the coal industry in 1977 fell in the range between 8% and 12%. Mr. Morris explained that coal property appraisals that applied the discounted cash flow method to undeveloped coal reserves, the professional literature, and surveys of the discount rates applied by coal producers all produced a discount rate in the 8% to 12% range. In addition, BLM's Guide to Federal Coal Property Appraisal (Appraisal Guide) states that the Department of the Interior uses a 10% after-tax discount rate in its DCF analyses. Indeed, even the NRET previously had used a 10% discount rate to value Whitney coal for exchange purposes.

Arguing that the coal business is a high risk venture, defendant asserts that this rate does not take into account the risks involved in starting a new business from scratch. In particular, defendant argues that the 10% rate does not reflect the probability that their proposed river diversions and final impoundments would not be allowed by DEQ. Defendant argues that a discount rate of 12.5% should be used to adequately reflect risks and contingencies.

The government's own Appraisal Guide addresses several rate analysis techniques in conjunction with the DCF valuation method. The Appraisal Guide refers directly to defendant's proposed method:

> An additional technique is to incorporate a risk premium in the discount rate to account for the higher returns required by the investor to draw investment capital to riskier ventures. The increased rate frequently serves as a proxy for the potential buyer's uncertainty of future events. *In general, the use of a discount rate adjustment to account for risk is not recommended because of overwhelming subjectivity involved in selecting the risk premium.*

Appraisal Guide at 52 (emphasis supplied).

It is clear that the government previously concluded that increasing the discount rate to reflect risks and contingencies in a DCF valuation is an erroneous method and will lead to an improper valuation. On the other hand, plaintiffs' method of incorporating risks and contingencies into their DCF valuation seems reliable and accurate. In addition to a 10% discount rate, the Boyd Plan offers a sensitivity analysis which incorporates all of the risks a potential Whitney buyer would consider when mak-

ing an offer to purchase the property. The sensitivity analysis takes several risk factors into consideration: Whitney was undeveloped; the proposed 4 million ton per year production rate might take several years to reach; a buyer of Whitney might not be able to acquire additional surface land; DEQ might not approve the Boyd Plan's river diversions; DEQ might not approve the Boyd Plan's final impoundments; and the price of coal might decrease over time.

Under the Boyd Plan, a net present (1977) value of Whitney coal of $93,161,000.00 was reduced to $82,767,000.00 after applying plaintiffs' sensitivity analysis. This represented a diminution in the 1977 value of Whitney assigned coal reserves by approximately 11%. The court finds that plaintiffs' sensitivity analysis is an accurate evaluation of the risks confronting a prospective purchaser of the Whitney property. The 11% discount reasonably reflects what a willing buyer would be likely to impose on Whitney before purchase. Because defendant's method of risk analysis, which adjusts the discount rate, has been rejected in previous government publications, and because we find the Boyd Plan's sensitivity analysis reasonable and accurate, we will adopt plaintiffs' 11% post-DCF [17] adjustment rate.

5. Costs

The Boyd Plan estimated both the capital and operating costs that a buyer would expect to incur during mining. The Boyd Plan's operating cost analysis first

[17] It must be stressed that the DCF figures include a discount of 10%, reflecting the after-tax real rate of return. The reduction of the value of Whitney coal by 11% that is supported by The Boyd Plan's sensitivity analysis is applied to the value discounted by the 10% after-tax rate of return.

estimated the labor costs which would be incurred at a Whitney mine. With respect to hourly labor costs, the Boyd Plan relied on labor rates established by the United Mine Workers of America's contract in force at Big Horn in 1977. While a willing buyer might not plan a union operation, he would obviously expect to pay rates and provide benefits similar to those at the nearby Big Horn Mine, with which he would compete for labor. With respect to salaried labor costs, Boyd relied on rates prevalent in the coal industry in 1977, paying particular attention to the salary levels at Big Horn. The Boyd Plan estimated the costs of benefits by considering benefit levels at Big Horn and applying appropriate percentages to the wage and salary rates. 3 *Boyd Plan* at 1-150-51.

The Boyd Plan also included other operating costs in its cash flows. It analyzed supply costs on the basis of manufacturer's data, published information, and the actual cost experience at Big Horn. It also included miscellaneous direct expenses (mine development drilling, laboratory costs, etc.), general corporate expenses (legal accounting, marketing, and administrative services ordinarily performed off site), insurance expenses, property taxes, and SMCRA's reclamation fee.

The Boyd Plan's capital cost analysis considered all the capital costs that a willing buyer of Whitney would expect to incur in a mining operation. It estimated the unit prices for each item of equipment on the basis of actual quotes or purchases from 1977, where such data was available; in other cases it relied on published indices. The Boyd Plan took into account miscellaneous capital expenses. In determining cash flow, for example, it included costs for engineering and permitting work that a willing buyer would have expected to incur, given the amount of

work that PKS had already done by the time SMCRA was enacted in August 1977.

When determining if the actual costs projected in the Boyd Plan are accurate, it is helpful to note that the government itself sets forth virtually the same type of cost analysis in its 1985 BLM Appraisal Guide. Defendant argues that this court should not look to the Appraisal Guide when determining its cost criteria for a hypothetical sale of Whitney because the Appraisal Guide was only used to value leases, not sales. Defendant's contention cannot be taken seriously. The Appraisal Guide itself states that it can be used to value federal coal property "to be disposed of through leases, exchanges, or other methods." Appraisal Guide at 1 n.1.

The Appraisal Guide states that an appraiser using the DCF valuation methods should estimate both capital and operating costs. As capital costs, the appraiser must estimate pre-mining studies, site preparation and surface facilities, mine equipment, preproduction development costs, working capital, and indirect, administrative, and contingency items. Appraisal Guide at 43-46. As operating costs, the appraiser must estimate labor, equipment and supplies, utilities, payroll, overhead, contingencies, and other costs. Appraisal Guide at 47.

The court is satisfied that the Boyd Plan's detailed analysis of costs includes the factors suggested by the BLM, and is accurate. The court thus agrees with the plaintiffs that a willing and knowledgeable purchaser of Whitney coal in 1977 would have contemplated $68,132,000.00 in capital expenditures and $3.747 per ton in operating costs for a 4 million tons per year mine. Because the operating costs are primarily composed of production-related items such as

overburden stripping and coal loading, it is reasonable to expect that if the annual production level is reduced to 2.5 million tons, the total operating cost would decrease proportionately, or to 62.5% of the operating costs of a 4 million ton per year mine.

Unlike the operating costs, however, capital costs will not drop in proportion to the decrease in production level from 4 million tons per year to 2.5 million. Rather, some capital costs will change while others will remain fixed. Plaintiffs have provided a reliable estimate of which capital costs will vary. Figure 2 below represents these variables and also calculates the total capital expenditures.

FIGURE 2

ADJUSTMENTS OF INDIVIDUAL CAPITAL COSTS

COST	Cost @ 4 Mtpy $-000	4-TO-2.5 Adjustment Factor	Adj Cost @ 2.5 Mtpy $-000
Mine Facilities & Site Dev't	478	1	478
Drainage & Diversions	1532	1	1532
Overburden Preparation	1122	.625	701
Overburden Stripping	25911	.625	16194
Coal Loading	3981	.625	2488
Coal Haulage—Equipment	7369	.625	4606
—Roads	2442	1	2442
Reclamation	3169	.625	1981
Power Distribution	539	1	539
Coal Handling Facilities	7877	1	7877
Mine Service Buildings & Equipment	4272	1	4272
General Purpose Equipment	2929	1	2929
Miscellaneous	6511	1	6511
Total	68132		52550

Thus, the Boyd Plan, adjusted for a 2.5 million ton per year production level, substantiates capital costs

of $52,550,000.00, or a reduction from the 4 million ton per year level of 23 percent.

Due to a number of factors including defendant's failure to offer an estimate of specific costs, the government's consistent use of the BLM Appraisal Guide to value coal property, the Appraisal Guide's use of essentially the same cost criteria as the Boyd Plan, and the Boyd Plan's detailed and persuasive cost analysis, this court will use the Boyd Plan data, as modified above, in its cost estimates.

The main cost issue before the court is defendant's contention that the Boyd Plan substantially underestimated reclamation costs. Defendant argues that the Boyd Plan does not allow enough floor space in the pit for mining operations and that backfilling the rear of the pit while mining its front is not a realistic expectation. Defendant's expert, Mr. Kenneth Nation, testified that a substantial portion of the pit's backfill will have to be deposited in spoil piles and later returned to the pits after mining has ceased. This would involve handling the overburden and innerburden of the pits twice which would dramatically increase costs and make the mine unprofitable and its coal valueless.

In a related argument, defendant argues that the Wyoming DEQ would not allow the final impoundments and spoil piles over third party coal that the Boyd Plan projects. Defendant contends that DEQ would require plaintiffs to backfill the impoundments completely.

The court believes that both of defendant's contentions on this point are credible. It is of the opinion that a buyer of Whitney coal would believe it likely that it would be required to backfill the entire final impoundments. Therefore, plaintiffs' recovery should

be reduced by the amount it would take to backfill both the East and West Whitney pits.

In their post-trial brief, plaintiffs presented a logical analysis of the 1977 value of the cost of entirely backfilling the impoundments at the end of mine production. In essence, plaintiffs' analysis calculated the 1977 amount that a willing buyer of Whitney would have to expend in 1977 to have the reclamation completed some twenty years in the future. Plaintiffs calculated that amount to be between $1 million and $2 million. The court believes that a prudent buyer of Whitney, if he expected to toally backfill his impundments, would have allowed $2 million in costs to cover that future expenditure. Plaintiffs' expert, Mr. Bate, on cross-examination and on redirect testifield that this is a common practice in the coal industry and we find his testimony reliable and accurate. As a result, $2 million will be deducted from the amount awarded to plaintiffs for the value of the assigned reserves.

6. Calculations

In its calculation section, the Boyd Plan incorporates the same discount rate, unit cost per ton, cost esimates, and sensitivity adjustments that this court has found accurate and reliable. This court will adopt the Boyd Plan's calculations with an adjustment to reflect a 2.5 million tons per year production level as opposed to the Boyd Plan's 4 million tons per year level.

a. Assigned Reserves

The Boyd Plan sets forth a detailed table of calculations used to derive the fair market value of the assigned reserves of Whitney coal in 1977. A sum-

mary of these calculations, adjusted for a mine with an annual production rate of 2.5 million tons, is presented in the appendix to this opinion. In keeping with the court's determination that the production would have been 62.5% of that estimated in the Boyd Plan, and for reasons set forth above, these calculations include a 37.5% reduction in the after-tax income and operating costs and a 23% reduction in capital costs.

The calculations result in a net present (1977) value of $52,755,000.00 for the assigned reserves of Whitney coal. For reasons stated previously, the value of the assigned reserves must be reduced by the cost of fully backfilling the pits at the completion of mining. Accordingly, the court will deduct the $2 million backfill cost from the above value of the assigned reserves, for a net of $50,755,000.00. Finally, that figure must be adjusted to take into account the Boyd Plan's sensitivity analysis. Applying that reduction to the net value of the assigned reserves after backfilling ($50,755,000) indicates a value of $45,172,000, or $0.844 per ton.

b. Residual Reserves

Although we have decreased the production level of the Boyd Plan from 4 million tons per year to 2.5 million tons per year, this decrease in assigned reserves increases the amount of residual reserves that are to be left in the ground under the Boyd Plan. Accordingly, the residual reserves would equal the difference between the total number of technologically-recoverable tons (143,017,000) and the number of tons of assigned reserves (53,526,000), or 89,441,000 tons. The court is satisfied with the Boyd Plan's estimate that residual reserves have a value equal to

20% of the per ton value assigned reserves; therefore, the residual reserves are valued at $0.169 per ton, for a total value of $15,124,000.00.

c. Sum

From the foregoing, the court finds that the total value of recoverable Whitney coal, assuming an annual production level of 2.5 million tons of assigned reserves and a cost of backfilling of $2 million, is $60,296,000.00.

7. Interest

The Supreme Court has held that where the government pays just compensation after the date of taking, the property owner is entitled to interest on the award to ensure that he is placed in the same economic position as he would have occupied if the payment had coincided with the taking. *See Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984).

Defendant objects to this court awarding plaintiffs interest and maintains that paying interest on any award is unjustified where the property owner had no reasonable expectation of earning income from the property. Defendant's contention collapses upon itself with our prior determination that the Whitney coal has value and that a willing and knowledgeable buyer justifiably would expect to earn a substantial income from the Whitney coal. This court has been authorized by Congress to award pre-judgment interest on a claim against the United States if a specific congressional act so provides or if the plaintiffs' claims were based on contract. 28 U.S.C. § 2516(a).

Plaintiffs' claims are not based on contract nor is there a specific congressional act allowing interest in this situation, but the Supreme Court has recognized

an exception to 28 U.S.C. § 2516(a) where the claim against the United States is based on the Fifth Amendment. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 306 (1923).

As a result of this exception, an award of just compensation under the Fifth Amendment entitles a property owner to interest from the date of the taking to the date of the payment of the judgment. *See United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980).

It has been the practice of this court to award interest on taking claims based on the computation set forth in the Contract Disputes Act, 41 U.S.C. § 601-613 (Supp. V 1981). *Henry v. United States*, 8 Cl. Ct. 389, 394 (1985). The Act requires interest on contract claims to be paid at the rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41 (85 Stat. 97). *Id.* This method has congressional approval and is the most uniform method of awarding interest in claims against the United States. As a result, the rate formulated under the method prescribed by the Contract Disputes Act are the appropriate measure for calculating interest in a taking claim. *See Jones v. United States*, 3 Cl. Ct. 4, 7 (1983). Plaintiffs, therefore, are entitled to prejudgment interest on $60,296,000.00, to be calculated according to the Contract Disputes Act.

VII. The Exchange Provision

The Court of Appeals for the Federal Circuit has ruled, at least peripherally, on SMCRA's exchange provision. *Whitney*, 752 F.2d 1554. In that proceeding, the Federal Circuit held that the exchange is op-

tional with the landowner, rather than a mandatory means of paying just compensation. In so holding, the court concluded:

> Actually the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any exchange and pursue a money award under the Tucker Act. 28 U.S.C. § 1491.

Whitney, 752 F.2d at 1560

It is clear from *Whitney* that plaintiffs have the option to either pursue the exchange or to pursue a money remedy. The two courses of action are, at least to some extent, mutually exclusive.[18] A money award in the Claims Court should and will preclude any mandatory coal exchange pursuant to SMCRA. This, of course, does not preclude the parties from voluntarily concluding a deal, outside of SMCRA's exchange program where coal is used to offset money damages.

CONCLUSION

The Surface Mining Control and Reclamation Act reflected Congress's attempt at balancing the country's need for coal and the protection of agricultural resources and the environment. While it is not the role of this court to question the wisdom of that balancing or the manner in which Congress sought to achieve an equilibrium, this court must ensure that the Fifth Amendment's mandate that no "private

---

[18] The exchange provision does allow the government to pay up to 25% of the value of an exchanged property in cash, with the remaining 75% to be paid for by the land exchange itself.

property be taken for public use, without just compensation" is not ignored. In doing so, this court looks to the precedent laid out by the Supreme Court and our court of appeals. It applies this precedent to the fact specific questions of whether the instant balance struck by Congress amounted to a taking in this case and if so what compensation is just. It is clear to the court that to characterize the regulatory scheme here as "mere regulation" would virtually eliminate from the law regulatory takings. This would fly in the face of precedent this court is bound to follow.

After considering the extensive expert testimony and documentary evidence presented in this well-litigated case, this court finds that the economic impact of SMCRA on Whitney coal was to totally eliminate economic value, that plaintiffs' investment-backed expectations were reasonable, and that government action has deprived plaintiffs of all economically viable uses for their property. In holding that a taking has occurred, the court finds that the substantial public interest at stake does not outweigh the private interest such that plaintiffs should bear the full burden imposed by the government action.

It is this court's further decision that the taking took place upon the enactment of SMRCA. It is clear from the record that Congress acknowledged prior to enacting SMCRA that Whitney coal was situated in or on an AVF. Thus, it would be unreasonable under the particular facts of this case to hold that a taking could not have occurred until a subsequent administrative determination was made that mining of Whitney coal was prohibited.

For the foregoing reasons, this court finds that plaintiffs are entitled to $60,296,000.00 plus pre-judgment interest from August 3, 1977, the date SMCRA was enacted. Further, plaintiffs are entitled to attor-

neys fees and costs pursuant to 42 U.S.C. §4654(c) (1982).

IT IS SO ORDERED.

/s/ Loren A. Smith
LOREN A. SMITH
Chief Judge

APPENDIX

Discounted Cash Flow—Net Present Value Calculation

Year	Assn'd Tons 000	Gross CF @ 2.5 Mtpy $-000	Capital Exp. @ 2.5 Mtpy $-000	Net CF @ 2.5 Mtpy $-000	Discount Factor	Net Present Value @ 0% $-000
−4	313	0	829	−829	0.909	−754
−3	813	1273	9312	−8039	0.826	−6640
−2	1875	4486	15244	−10758	0.751	−8079
−1	2500	9337	3647	5690	0.683	3886
1	2500	12756	812	11944	0.621	7417
2	2500	12688	32	12656	0.564	7138
3	2500	12700	401	12299	0.513	6309
4	2500	12239	2499	9740	0.467	4549
5	2500	12207	1573	10634	0.424	4509
6	2500	12157	2033	10124	0.386	3908
7	2500	12342	1816	10526	0.350	3684
8	2500	12284	319	11965	0.319	3817
9	2500	12451	732	11719	0.290	3399
10	2500	12351	1364	10987	0.263	2890
11	2500	12406	3156	9250	0.239	2211
12	2500	12245	1461	10784	0.218	2351
13	2500	12316	1488	10828	0.198	2144
14	2500	12319	1141	11178	0.180	2012
15	2500	12263	654	11609	0.164	1904
16	2500	12047	1111	10936	0.149	1629
17	2500	11977	356	11621	0.135	1569
18	2500	11946	223	11723	0.123	1442
19	2500	11789	9	11780	0.112	1319
20	525	3634	2250	1384	0.102	141
Totals	53526			199751		52755

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal No. 84-919

WHITNEY BENEFITS, INC., and PETER KIEWIT SONS' COMPANY, APPELLANTS

v.

THE UNITED STATES, APPELLEE

Jan. 9, 1985

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and BISSELL, Circuit Judge.

NICHOLS, Senior Circuit Judge.

This case presents cross-appeals from an unreported decision of the Claims Court dismissing without prejudice a complaint seeking just compensation under the fifth amendment and 28 U.S.C. § 1491. The view of that court, as stated from the bench, was that under the facts no taking could have occurred up to the date of hearing and it was then uncertain whether a taking ever would occur. We have jurisdiction under 28 U.S.C. § 1295(a)(3). We hold that within the allegations of the complaint, appellants might establish facts constituting a taking. It is not a legal impossibility as the court below believed, though the instant record does not establish the matter one way or the other, without further fact investigation. Therefore, we reverse and remand.

Alleged Facts

Appellant, Whitney Benefits, Inc., alleges it is a nonprofit corporation owning in fee certain coal-bearing property in Sheridan County, Wyoming. Appellant, Peter Kiewit Sons' Company, owns in fee part of the same property and is lessor of the entire mineral estate in the rest, by lease dated December 3, 1974, and still in effect by extension. The property is described by metes and bounds and is on an alluvial valley floor significant to farming. On August 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 and ff, which by the theory of the complaint effects a legislative taking of the property involved. However, should any later event, up to the hearing, constitute the taking, appellants would amend to conform their theory of the action. They say the Act, expressly or in its "direct result," prohibited surface coal mining on land such as theirs. Desiring to mine, they applied for a license to the Wyoming Department of Environmental Quality, the state having enacted legislation conforming to standards it was required to meet in the federal act. The state denied the license, having no choice to do otherwise under its own or the federal law, according to the implicit theory of the complaint. According to representations by appellants to the court below in oral argument (but not substantiated by references to published legislative history) Congress was aware of this specific property and its problems, at one time considered, but in the end rejected, a "grandfather clause" to permit mining there, and could not but have intended mining of this property to be a target of the legislation. The mining would be conducted on the surface of the land, not underground. The plain meaning of the legisla-

tion is, and appellee United States does not seriously dispute, that there are special objections to coal mining on the surface of an alluvial valley floor and § 1260(b)(5)(A) reflects a specially preclusive treatment of this kind of "strip mining." Licensing is flatly prohibited if it would interrupt or preclude farming of substantial extent or materially damage water quality, and if the valley is west of the 100th meridian of west longitude.

There is a "grandfather clause" for such mining actually going on in the period within a year before August 3, 1977. Further, for operators who have not actually begun, but have made "substantial financial and legal commitments" towards beginning, the Secretary is authorized to agree with such operators to convey the fee to, or lease in exchange, other federal land embodying coal deposits (but presumably not arable valley alluvial land). The Congress further says—

> It is the policy of Congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded.

30 U.S.C. § 1260(b)(5)

The appellants, on denial of a license by Wyoming, according to counsel applied to the Secretary in 1979 for such an exchange but now, in 1984, negotiations are still under way with no agreement in sight. It is appellants' theory that this exchange provision has been rendered illusory, but they are willing to continue negotiating if assured that limitations will not run on their taking claim. Appellee says appellants

have sued it under 30 U.S.C. § 1270 in the United States District Court, District of Wyoming, to require the Secretary to effect an exchange.

Statutes Applicable

The relevant parts of § 1260(b)(5) are set forth hereinafter in an appendix, together with another portion of SMCRA which relates to judicial review, § 1270, "Citizen's Suits." There is no reference to a Tucker Act suit, 28 U.S.C. § 1491, in either provision.

Position of Court Below and Appellee

The court below did not file an opinion, but decided the case from the bench. Its view can be quite simply stated. It is that the exchange mechanism described above is a procedure for ascertainment and payment of just compensation, and since facially under the statute just compensation is thus provided, appellants do not have a Tucker Act claim "under the Constitution." The fifth amendment is thus complied with facially, and a Tucker Act claim does not even start to accrue until the "exchange mechanism" has failed to accomplish its end as actually applied. To establish this, appellants must pursue an acceptable exchange for some unstated period of time and then, if they can, convince the district court in one of the modes of review provided within the four corners of the statute, that "just compensation" is being unconstitutionally delayed or denied. The appellee in the court below contended that in a suit under § 1270 the court should grant a trial de novo as to the value of the property taken. Whether it would so contend in any other court is hard to say since § 1270 embodies no such requirement expressly.

The court below rejected appellee's other arguments: first, that Claims Court juirsdiction is com-

pletely precluded in all possible eventualities, and second, that the "exhaustion doctrine" requires appellants to contest the denial of the license by all state review procedures, administrative and judicial, even though they accepted denial of a license to mine as the only possible result under the statutes, federal and state. While appellee cross-appealed, we do not understand it to be urging on us the points the Claims Court rejected.

Discussion

The most obvious difficulty with the Claims Court's position, if we understand it correctly, is the fact that the "exchange mechanism" is nowhere stated in the statute or legislative history (so far as we have been able to delve into the latter) to be the exclusive method of ascertaining constitutional just compensation. The Supreme Court has recently reiterated that statutory supersession of the Tucker Act method is not lightly to be implied. *Ruckelshaus v. Monsanto Company*, —— U.S. ——, ——, 104 S. Ct. 2862, 2881, 81 L.Ed.2d 815 (1984) (following *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974)). Here the statute nowhere says the appellants are *obliged* to accept exchange land as "just compensation." It is more logical, and more consistent with the statute, to say it is a possible mode of settling a money claim which the claimant may accept if so minded, thus reducing the cash outflow from the Treasury. It seems obvious Congress did not mean to force an exchange upon a claimant not so minded. In the first place, the entire statute, including this portion, having been enacted at a time of "energy crisis," was meant to maintain the production of coal as a vital source of energy so far as consistent with the paramount environmental

concerns of the Act. To force an exchange on a claimant who wanted to get out of the coal business would be futile as he would dispose of the exchanged property for what it would realize.

We add that a cross-reference in § 1260(b)(5) says that exchanges shall be made under 43 U.S.C. § 1716. This latter provision was part of the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2756, and neither that Act nor its legislative history offer any suggestion that exchanges are authorized without the consent of the private party with whom the exchange is effected.

Finally, as to this question of interpretation, an attempt to force a person otherwise identifiable as a former owner of property taken, to receive as just compensation other lands rather than money, would be of dubious constitutionality. This matter is discussed in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150, 95 S.Ct. 335, 361, 42 L.Ed.2d 320 (1974), but resolved only in the context of the Court's holding that the statute there under review was an exercise of the bankruptcy power rather than one for the acquisition of property for public use. The modern view, as stated in that case, and in 3 P. Nichols, *Eminent Domain* § 8.2 (3d ed.1984) is that statements that just compensation must always be in money are too sweeping. However, requirements that a condemnee accept the taker's bonds, or its surplus lands, remain pretty indefensible. Of federal cases there are cited, as to land, only *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 1 L.Ed. 391 (C.C.D.Pa. 1795), which is positive that the Constitution does not permit any such imposed substitution. This is a very old case and not of our highest court, but it is followed by a number of state cases, and has been cited by Nichols in all editions for the proposition stated. While we

do not undertake to decide this constitutional issue, as we do not think it is presented by the statute we are to interpret and apply, it stands as a good reason to prefer an interpretation which does not confront us with any constitutional question.

Where the question is whether a regulation not meant to take an interest in land is so onerous as to effect a taking by imputation, and with no provision for money compensation, the availability of substitution rights may be important in determining whether the regulation is something the landowner can live with without unfairness. This is why substitution rights play the important part they do in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), a case much discussed by the parties herein. But the Court there is very clear also that Penn Central was not prevented from deriving profit from the involved real property, only limited in its further development. Evidently an *option* to substitute, as in *Penn Central*, placed the aggrieved landowner in a more favorable position, and therefore in a poorer one to complain of a breach of the just compensation clause. On the other hand, if we have here a *requirement* that the landowner accept a substitute, instead of money, he is in a worse position instead of a better one, particularly insofar as concerns his entitlement to "delay damages," also known as interest from the taking date. No such requirement was before the Court in *Penn Central, supra.*

There are certain legal situations where ours or any other sovereign government, exercising its proper power, can manage the property of citizens, transforming it by sale or exchange from one kind of property to another, without necessarily effecting a

taking, at least as long as it is not acting in entire disregard of the owner's interests. One instance is bankruptcy, dealt with in *Regional Rail Reorganization Cases, supra.* A second is the property of dependent Indian tribes. *See United States v. Sioux Indian Nation*, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed. 2d 844 (1980) and cases there cited. A third are the claims of United States citizens against foreign nations which have repudiated their debts or deny owing them, or given offense in some other manner. *See Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). The government makes no contention that it is entitled to take over and manage the property of the appellants here on the above grounds, or any others of the same nature. Therefore, cases such as those cited in this paragraph have no bearing on the right of the government to impose a substitution here.

We hold, therefore, that the pursuit of a substitution or exchange transaction under § 1260(b)(5) is not a mandatory remedy but is optional with the landowner, who retains also the option to sue in the Claims Court for money without such pursuit. The existence of the exchange option may have at times a bearing on whether or when a taking has occurred, but it is not a jurisdictional bar to merely filing the lawsuit, as the government and the Claims Court conceived. Since the option may perfectly well be exercised after the taking, as a means of settling the just compensation claim, it is not by its mere existence incompatible with a claim for a legislative taking, or a taking at any other later time.

We agree with the Claims Court judge that the exhaustion doctrine does not require appellants to do anything so absurd as to pursue to the bitter end, in state administrative tribunals and in courts, an at-

tack on a state decision denying them a permit to mine, which decision they believe to have been correct.

The government seemed also to argue below that the "citizen's suit" remedy under § 1270 was meant to be preclusive of the Claims Court remedy under 28 U.S.C. § 1491. We gather the point is abandoned here, but as it is jurisdictional we consider it briefly. As the title "citizen's suit" implies, the object of writing the provision was to assure access to the courts by "private attorneys general" whose standing was as tenuous as the Supreme Court would permit. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 90, *reprinted in* 1977 U.S. Code Cong. & Ad. News 593, 626. There is nothing to show that attention was focused on just compensation suits brought by targets of regulation, but in any event, the provision expressly states it is not preclusive of any remedies a person may have under any other law. The view of the Supreme Court as to the role of the Tucker Act suit as a safety net to assure compliance with just compensation requirements, as expressed in *Ruckelshaus v. Monsanto*, *supra*, and other cases cited therein, is entirely inconsistent with any reading of the citizen's suit provision, § 1270, as carving anything out of the jurisdiction of the Claims Court as it otherwise would be.

Assuming then, contrary to the belief below, that there is no jurisdictional preclusion or other statutory bar, it would seem impossible to dismiss this suit for just compensation under the Tucker Act on motion, just on reading the complaint, without other evidence. It would reveal extraordinary ineptitude on the part of the complaint draftsman, ineptitude which counsel on neither side give any evidence of suffering from. The complaint alleges a legislative taking, effective to accrue the claim on the date of enactment of the statute, but if a taking occurred on any later date,

the court would allow amendment, and the theory of dismissal was and could only be that it had not occurred at all and could not have.

The Supreme Court has repeatedly stated that it has been unable to develop any "set formula" to determine when "justice and fairness" require that "economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Ad hoc factual inquiries are necessary, and several factors are identified such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 295, 101 S.Ct. 2352, 2370, 60 L.Ed.2d 1 (1981) (quoting from *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979)). *Hodel* is of special interest as it deals with the same SMCRA that we have before us, though it is important to note we deal with an entirely different portion of the Act than did the Court in that case. It dealt with surface mining in Virgina and West Virginia, while we consider provisions in § 1260(b)(5) that deal solely and only with alluvial farm land located west of the 100th parallel. The important teaching of *Hodel* is that because of the ad hoc nature of the inquiry, a sweeping fifth amendment attack is not possible. The court must have specific tracts of land before it, and the aggrieved owners of these tracts must show they have done everything they reasonably could to take advantage of any hardship exceptions or other escape hatches that the regulations under attack allow. It is in this kind of context that fifth amendment litigation is also held premature in such cases as *Agins v.*

Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

A provision for just compensation is not the kind of escape hatch *Hodel* and *Agins* refer to and have in mind. The instant case differs in that we are not concerned only with regulation in which government acquisition is not contemplated and the private owners are expected or at least hoped to remain in charge. Here the language to be construed provides more than mere regulation: It specifically visualizes government acquisition of interests in land. We repeat the statutory words—

> It is the policy of Congress that the Secretary shall develop and carry out a coal exchange program to *acquire* private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded. [Emphasis supplied.]

When an interest in land is to be acquired and the only question is when title is to pass, the difficulty in discerning a taking is much reduced, as the Court of Claims held in *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 584, 191 Ct.Cl. 389 (1970). It was explained that when the government singles out land for ultimate acquisition—

> We think that the activities of officials can be found to be takings much more readily when there is no official question whether the land is to be acquired, only when, and the activities involved are all directed to that ultimate end. This is a hybrid situation, not the pure legislative taking, as in the Redwoods Act, and not the pure physical invasion of land apparently unwanted as

> Government property, as in *Eyherabide* [*v. United States*, 345 F.2d 565, 170 Ct.Cl. 598 (1965)]. The Congress was well aware of the economic harm that would result to persons who intended subdivision and others, if the inchoate taking were left unperfected.

The court had previously expressed the view that some kind of inchoate interest inured to the government upon the passage of the Act, since it pointed to the Drakes Bay land as intended for ultimate acquisition. The court noted that justice would require that the value of the land should neither be enhanced nor diminished by the expectations rising out of the statute itself. It held, therefore, that the time when economic development was effectually prevented was the date of taking. It is to be noted that our present appellants allege that the passage of the SMCRA is itself effectually halted economic development of their land as coal land, without more being done on the government side. This could lead to selection of a taking date which is, in relation to the date of statutory enactment, earlier than the date selected in *Drakes Bay*.

Should there be any doubt that there are in this case fact issues requiring further development, if not trial, it is resolved by *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). That case deals with a mining claim alleged to have been subjected to a legislative taking by an amendment providing that dredge or placed mining was prohibited within a certain river bed. The panel of this court held, reversing the Claims Court, that this could constitute a legislative taking if the claimant could try on the shoe and it fit, *i.e.*, if it could show its claim within the river

bed, and that it could not mine except by the prohibited method. This conclusion was much aided by the fact that, as also here, Congress recognized it might owe money to certain persons as a result of its legislation, and appropriations were authorized. Besides the Supreme Court authority also cited by us, the panel refers to *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983), another holding by this court. It teaches that the frustration of mining operations can be a taking even though the government believes it is only protecting its legal rights, and also, that whether or not there has been a taking, even if not so intended, is normally a fact issue that cannot be resolved except on a "complete record," or a trial.

Conclusion

We conclude that the decision and judgment of the Claims Court, to dismiss the complaint, was erroneous and must be reversed. The major premise, that pursuit of an exchange transaction must occur and be unsuccessful before a taking can occur, is a misconstruction of the governing statute. Actually the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any exchange and pursue a money award under the Tucker Act, 28 U.S.C. § 1491. Under and within the allegations of the complaint, as it is or as it may be amended, complainants may be able to prove that the property identified in the complaint is coal deposits, or interests therein, as to which surface mining is effectively prohibited by 30 U.S.C. § 1260(b)(5), and as to which, without prohibited surface mining, the realization of investment-

backed expectations is precluded thereby. They may be able to prove that a constitutional taking has occurred as of the date of the legislation, August 3, 1977, or some subsequent date that has already occurred. The court is not precluded from suspending or staying the action if it believes that further pursuit of the exchange transaction before the Secretary or in court may result in a trial being unnecessary and thus in a conservation of judicial resources. Accordingly, the judgment of dismissal is reversed and the cause is remanded for the conduct of further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATUTORY APPENDIX

(30 U.S.C.)

§ 1260. Permit approval or denial

* * * * *

(b) Requirements for approval

No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

* * * * *

(5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—

(A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irregated or naturally subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the regulatory authority finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production, or

(B) not materially damage the quantity or quality of water in surface or underground water systems that supply these valley floors in (A) of subsection (b)(5) of this section:

Provided, That this paragraph (5) shall not affect those surface coal mining operations which in the year preceding August 3, 1977 (I) produced coal in commercial quantities, and were located within or adjacent to alluvial valley floors (II) had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors.

With respect to such surface mining operations which would have been within the purview of the foregoing proviso but for the fact that no coal was so produced in commercial quantities and no such specific permit approval was received, the Secretary, if he determines that substantial financial and legal commitments were made by an operator prior to January 1, 1977, in connection with any such operation, is authorized, in accordance with such regulations as the Secretary may prescribe, to enter into an agreement with that operator pursuant to which the Secretary may, notwithstanding any other provision of law, lease other Federal coal deposits to such operator in exchange for the relinquishment by such operator of his Federal lease covering coal deposits involving such mining operations, or pursuant to section 1716 of title 43, convey to the fee holder of any such coal deposits involving such mining operations the fee title to other available Federal coal deposits in exchange for the fee title to such deposits in exchange for the fee title to such deposits so involving such mining operations. It is the policy of the Congress that the Secretary shall develop and carry out a coal exchange program mined by the restrictions of this paragraph (5) in

exchange for Federal coal which is not so precluded. Such exchanges shall be made under section 1716 of title 43;

* * * * *

§ 1270. Citizens Suits

(a) Civil action to compel compliance with this chapter

Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constituion where there is allged a failure of the Secretary or the approprite State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

(b) Limitation on bringing of action

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this chapter, or any rule, regulation, order, or permit issued pursuant to this chapter, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(c) Venue; intervention

(1) Any action respecting a violation of this chapter or the regulations thereunder may be brought only in

the judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

(d) Costs; filing of bonds

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Effect on other enforcement methods.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of the provisions of this chapter and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(f) Action for damages

Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

MARKEY, Chief Judge, dissenting.

I respectfully dissent, and would affirm dismissal of the complaint.

Neither enactment of 30 U.S.C. § 1260(b)(5) nor Wyoming's subsequent permit denial constituted in my view an acquisition by the United States of an interest in coal belonging to Whitney Benefits or to Peter Kiewit Sons' Co. (Benefits). Section 1260(b)(5) forecloses only the surface mining, i.e., "strip mining", of coal under an alluvial valley floor west of the one hundreth meridian west. Benefits remains free under the *statute* to mine its coal by other, less environmentally damaging methods. In my view, Benefits' expectation of a permit to strip mine does not, in itself and without more, constitute "property" as envisaged in the Fifth Amendment.

A statute regulating the uses of property is reviewed on the basis of whether it denies an owner "economically viable use". *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *see also Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). Section 1260(b)(5), while prohibiting *surface mining*, conditionally provides for other methods of mining, thereby permitting "economically viable use". Thus, the prohibition of the statute is distinguishable from that involved in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922), in which a state statute forbade *any* mining of coal that caused the subsidence of any house, thus rendering *all* means of mining commercially impracticable . Benefits has not alleged that denial of a permit to strip mine deprived it of all opportunity to mine its coal by other methods. Indeed, its complaint nowhere mentions any other

method, but simply asserts that the mere passage of the statute constituted a taking on the date of its enactment.

Under § 1260(b)(5), methods which do not "interrupt, discontinue, or preclude farming," 30 U.S.C. § 1260(b)(5)(A), and which do not "materially damage the quantity or quality of water in surface or underground water systems," 30 U.S.C. § 1260(b)(5)(B), are expressly excepted from the general prohibition. Thus, if Benefits selected a method meeting those requirements, the statute would not preclude its obtaining a permit. That an alternative permissible method might be less *profitable* is not determinative. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-28 98 S.Ct. 2646, 2659-61, 57 L.Ed.2d 631 (1978). If Benefits should decline to follow statute and regulation, it would be entitled to nothing. *See generally* 123 CONG.REC. 15,965-66 (May 20, 1977).

Though I would affirm the dismissal, I would not adopt the approach employed by the Claims Court. It held, in essence, that the time for a taking suit, if any, had not yet arrived. It employed a proposition appearing in *Hodel*, *supra*, 452 U.S. at 297 n. 40, 101 S.Ct. at 2371 n. 40, in which the Supreme Court said "an alleged taking is not unconstitutional unless just compensation is unavailable." Accepting Benefits' allegations as true for the purposes of the Government's motion to dismiss, the Claims Court held that availability of a fee coal exchange provision under § 1260(b)(5) was material in considering whether "just compensation is unavailable," and thus in considering whether an unconstitutional taking had in fact occurred. *See Penn Central*, *supra*, 438 U.S. at 137, 98 S.Ct. at 2665. Thus, it concluded that the case was not ripe for adjudication because an avail-

able administrative remedy, which might potentially yield a dollar-for-dollar "recovery", had not been exhausted. *See Hodel, supra*, 452 U.S. at 297, 101 S.Ct. at 2371. In considering the Government's motion to dismiss, however, the Claims Court was required to accept only Benefits' fact allegations, not its legal assertions concerning what type of property interest may be judicially recognized as subject to an unconstitutional taking.

The basis for assertion of a taking claim appears in paragraph 9 of the complaint:

> 9. As a direct result of the passage of SMCRA [§ 1260(b)(5)] and the prohibition of surface coal mining on alluvial valley floors significant to farming, plaintiffs have been deprived of the benefits of ownership and denied economically viable use of the property in question.

The foregoing allegation asserts that a denial of "economically viable use" occurred the moment § 1260(b)(5) was passed. Because that statute forbade only surface mining, it is possible to assume, as the Claims Court was required to assume in considering the motion to dismiss, that Benefits was alleging that surface mining is an economically viable use of the property right in question. That the statute denies *that* use is clear in the wording of the statute itself. Nowhere, however, does the complaint allege that surface mining is the *only* economically viable use of the property right, or that other mining methods are impossible, impractical, or not economically viable. Indeed, counsel for plaintiff told the Claims Court: "With respect to this particular piece of property, *if it can't be used to mine coal*, it has no other economically viable use." (emphasis added). My difficulty with the complaint lies precisely here, that it

fails to allege facts bringing Benefits within the purview of the statute, a statute that does *not* say the property in question "can't be used to mine coal."

Though all inferences must be drawn in favor of the complainant, it would not seem too much to ask that one relying on a statute that forbids one use and specifically permits others be required to allege facts applicable to the entire statute. In *Skaw v. United States*, 740 F.2d 932, 939 (Fed.Cir. 1984), for example, summary judgment was reversed because the parties had submitted to the trial court three factual issues, one of which was whether plaintiff's mining claim could be mined by methods other than the placer or dredge mining prohibited by the statute involved in that case.

Because I consider Congress' removal of the freedom to strip mine as not in itself constituting a judicially cognizable taking, and because Benefits has not alleged facts indicating that strip mining is the only economically viable use, I would dismiss the complaint for failure to state a claim on which relief could be granted.

"[N]ot all economic interest are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *United States v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945). That a taking will not lie under the allegations of this complaint is particularly appropriate where, as here, Congress has conclusively determined the "use" precluded by statute to be destructive of the public health and welfare. 30 U.S.C. § 1201; *see also Penn Central, supra*, 438 U.S. at

130-31, 98 S.Ct. at 2662; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

Benefits stated before the Claims Court that it would be perfectly happy with a stay order, that it was currently conducting negotiations with the Secretary, and that it had filed its complaint in the Claims Court as a precaution (1) to forestall the effect of a statute of limitations that might run from an early date of any "taking" that might be found to have occurred, and (2) to "light a fire" under the Secretary. It has gained these objectives, and has now filed a "citizen's suit" in district court to compel exchange of its interests for federal coal. That is as Congress intended the process to work.

The present statute envisages neither condemnation nor land acquisition. That one denied the right to strip mine in a first location may choose to compel the Secretary to grant the right to mine at a second location, and that the Secretary shall receive in exchange the right to mine in the first location, does not constitute a land acquisition or a program designed to acquire mining rights. The exchange provision is consistent with the dual intent of Congress of promoting development of the nation's coal resources while simultaneously precluding injury to the environment resulting from strip mining. 30 U.S.C. § 1202. The present exchange mechanism is thus one contributing to fairness, *see* 123 CONG.REC. 15,755 (May 20, 1977), and is not unlike the Transferable Development Rights involved in *Penn Central*, 438 U.S. at 137, 98 S.Ct. at 2665.

As above indicated, I would dismiss the complaint for failure to state a claim on which relief could be granted, with leave, of course, to amend, if Benefits is able, to assert facts indicating that it cannot economically mine its coal by any other methods permitted in § 1260.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5058

WHITNEY BENEFITS, INC., and PETER KIEWIT SONS' CO., PLAINTIFFS-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLANT

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response there to having been invated by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

Chief Judge NIES would grant rehearing in banc.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINHDART
Clerk

Dated: May 6, 1991

cc: John A. Bryson
George W. Miller

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5058

WHITNEY BENEFITS, INC., and PETER KIEWIT SONS' CO., PLAINTIFFS-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLANT

ORDER

Before MARKEY, Circuit Judge, NEWMAN, Circuit Judge, CLEVENGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on April 9, 1991.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINHDART
Clerk

Dated: April 2, 1991

cc: JOHN A. BRYSON
GEORGE W. MILLER

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides in relevant part:

> nor shall private property be taken for public use, without just compensation.

2. Section 510 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1260, provides in relevant part:

§ 1260. Permit approval or denial

(a) Basis for decision; notification of applicant and local government officials; burden of proof

Upon the basis of a complete mining application and reclamation plan or a revision or renewal thereof, as required by this chapter and pursuant to an approval State program or Federal program under the provisions of this chapter, including public notification and an opportunity for a public hearing as required by section 1263 of this title, the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time set by the regulatory authority and notify the applicant in writing. The applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program. Within ten days after the granting of a permit, the regulatory authority shall notify the local governmental officials in the local political subdivision in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land.

(b) Requirements for approval

No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with:

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

(3) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 1257(b) of this title has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside permit area:

(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 1272 of this title or is not within an area under study for such designation in an administrative proceeding commenced pursuant to section 1272(a)(4)(D) or section 1272(c) of this title (unless in such an area as to which an administrative proceeding has commenced pursuant to section 1272(a)(4)(D) of this title, the operator mak-

ing the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit);

(5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—

(A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding underdeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the regulatory authority finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production, or

(B) not materially damage the quantity or quality of water in surface or underground water systems that supply these valley floors in (A) of subsection (b)(5) of this section:

Provided, That this paragraph (5) shall not affect those surface coal mining operations which in the year preceding August 3, 1977, (I) produced coal in commercial quantities, and were located within or adjacent to alluvial valley floors or (II) had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors.

With respect to such surface mining operations which would have been within the purview of the foregoing

proviso but for the fact that no coal was so produced in commercial quantities and no such specific permit approval was so received, the Secretary, if he determines that substantial financial and legal commitments were made by an operator prior to January 1, 1977, in connection with any such operation, is authorized, in accordance with such regulations as the Secretary may prescribe, to enter into an agreement with that operator pursuant to which the Secretary may, notwithstanding any other provision of law, lease other Federal coal deposits to such operator in exchange for the relinquishment by such operator of his Federal lease covering coal deposits involving such mining operations, or pursuant to section 1716 of title 43, convey to the fee holder of any such coal deposits involving such mining operations the fee title to other available Federal coal deposits in exchange for the fee title to such deposits so involving such mining operations. It is the policy of the Congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded. Such exchanges shall be made under Section 1716 of title 43;

(6) in cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted to the regulatory authority—

(A) the written consent of the surface owner to the extraction of coal by surface mining methods; or

(B) a conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law: *Provided*, That nothing in this chapter shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20548

No. 91-195

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

WHITNEY BENEFITS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

GEORGE W. MILLER
Counsel of Record
WALTER A. SMITH, JR.
JONATHAN L. ABRAM
CHARLES J. FELKER
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6575
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should decline to reconsider the factual determinations of the Claims Court, concurred in by the Court of Appeals, that the effect of enactment of Section 510(b)(5) of the Surface Mining Control and Reclamation Act on respondents' particular property was to deprive respondents of all economically viable use of that property.

II. Whether the Claims Court and Court of Appeals are precluded from recognizing a taking of property upon enactment of a statute even where, as here, (1) those courts found as fact that (a) the language of the statutory prohibition against surface mining on certain kinds of property precisely described respondents' particular property, (b) the prohibition so obviously precluded development of respondents' property that it immediately destroyed all economic value of respondents' previously valuable property, and (c) no administrative proceedings could possibly have altered that total destruction because they could not have altered the prohibition against use of the property; (2) respondents nevertheless exhausted all administrative proceedings; and (3) those proceedings inevitably proved futile, thereby confirming the courts' determination that in no event could the proceedings have altered the destruction of economic value that was complete upon enactment of the statute.

PARTIES TO THE PROCEEDINGS

Respondents adopt the statement of parties to the proceedings in the Petition and, pursuant to Supreme Court Rule 29.1, state that respondent Whitney Benefits, Inc. is a Wyoming charitable corporation. It has neither parent nor subsidiary companies. Respondent Peter Kiewit Sons' Co. is a Nebraska corporation. It has the following parent companies: Peter Kiewit Sons' Inc., Kiewit U.S. Co., and Kiewit Construction Group Inc. Its only subsidiary is a partnership, CMF Leasing Co., in which respondent Peter Kiewit Sons' Co. owns a 90 percent interest. Kiewit Construction Company owns a ten percent interest in that partnership. Kiewit Construction Company is a wholly owned subsidiary of Kiewit Construction Group Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-195

UNITED STATES OF AMERICA,
Petitioner,

v.

WHITNEY BENEFITS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The government presents this case as one in which property owners have "circumvented" administrative procedures under a federal land use statute by going directly to the Claims Court with a "taking" claim, rather than allowing the administrative process to run its course. According to the government, the lower courts erroneously acquiesced in this "circumvention," and the result both invites "regulatory chaos" and contradicts this Court's settled "takings" jurisprudence. None of this is so.

In fact, respondents patiently exhausted the pertinent administrative proceedings in this case, and the lower courts did not act until those proceedings had run their course. Furthermore, when they did act, both courts agreed that the AVF prohibition in Section 510(b)(5) of

the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. 1260(b)(5), so plainly prohibited respondents' use of their property that its value was effectively destroyed upon the statute's enactment and the subsequent administrative process was "obviously and absolutely foredoomed" from the outset. In those circumstances, both courts found—consistent with this Court's decisions—that because the total destruction of respondents' particular property was effectively complete the day the statute's prohibition was enacted, the taking occurred on that date.

It is only by ignoring both what actually happened in this case and the lower courts' key factual findings that the government is able to suggest that this case is of importance and represents a departure from this Court's precedents. We therefore offer the following brief counterstatement to clarify these matters.

A. The Factual Findings in This Case.

Following a lengthy trial, the facts in this case were found by the Claims Court and affirmed by a unanimous panel of the Court of Appeals. With respect to the central issue raised by the government's petition—the date of the taking—both lower courts found that SMCRA's AVF prohibition plainly applied to the Whitney property. Indeed, as the Federal Circuit noted, prior to trial the government conceded in a Federal Register announcement that "[d]evelopment of the Whitney coal was halted by the passage of [SMCRA]." Appendix to Petition for Certiorari ("App.") at 7a (quoting 51 Fed. Reg. 3124, 3125). "Having made that concession," the court continued, "the government offered absolutely no evidence at trial to counter that official statement" and did not present "a single witness to testify that there was any uncertainty whatever about SMCRA's taking effect on [respondents'] coal property" upon enactment. App. 7a-8a. Respondents, on the other hand, "proved that SMCRA's . . . prohibition applied to the property because of obvious physical facts

about the property." App. 8a. In these circumstances, the Claims Court found, and the Federal Circuit agreed, that "the government knew SMCRA applied on enactment to Whitney coal. [Respondents] knew SMCRA applied; and any prospective buyer would know it applied." App. 8a.

The Claims Court also found—and again the Federal Circuit concurred—that on the described facts no statutory permit could possibly have been granted to respondents after SMCRA became law. Indeed, the Federal Circuit noted, "the government does not suggest, and did not suggest at trial, *any basis whatever* on which a permit could legally be granted to surface mine Whitney coal." App. 4a (emphasis supplied). Accordingly, the Circuit Court not only found no errors "in the Claims Court's finding that any surface mining permit application would in this case have been futile." App. 5a. But the court went further and held that "the record is clear that any such application was obviously and absolutely foredoomed on the day SMCRA was enacted." The court therefore concluded that from "[t]he moment SMCRA was enacted," respondents "no longer had [their] property right [to mine coal], for [respondents] had no permit and could not possibly under the statute obtain one . . . ." App. 6a.

Finally, the Claims Court found—and for a third time the Federal Circuit agreed—that SMCRA's enactment had "deprive[d] [respondents] of 'all economically viable use' of their property" by "destroy[ing] all [economic] value in Whitney coal." App. 7a, 12a, 18a. This was so, the court held, because "as the Claims Court correctly found," the "only possible use" of respondents' property was the surface mining of coal and, once SMCRA prohibited that mining, the statute took "all the property involved in this case." App. 5a.

Given the foregoing findings, the Federal Circuit affirmed the Claims Court's determination that respondents'

property had been taken upon enactment of SMCRA, and that they were entitled to receive the value of their property as of that date.[1]

B. The Administrative Proceedings in This Case.

After SMCRA precluded the mining of their property, respondents began their lengthy pursuit of compensation in the form of a coal exchange, as provided by the statute, 30 U.S.C. 1260(b)(5). As the first step, Kiewit filed a full application for permission to mine the East Whitney tract. In January 1979, the Wyoming Department of Environmental Quality ("DEQ") confirmed the obvious—that the East Whitney tract contained an AVF and that no permit could be granted because, necessarily, the application had not demonstrated the requisite statutory showing—that mining would not "[i]nterrupt, discontinue, or preclude" use of the AVF for farming. C.A. App. 6362; *see also* C.A. App. 1005 at ¶ 32. DEQ accordingly wrote the Secretary of the Interior that "the majority of the [Whitney] mine area is located within an [AVF] as defined" by SMCRA, and to request that the Secretary consider respondents for a coal exchange. C.A. App. 6399.

Respondents then applied to Interior's Bureau of Land Management ("BLM") for an exchange, C.A. App. 6403; *see also* C.A. App. 1006 at ¶ 35, and, on August 13, 1981, BLM's Wyoming State Director determined that "Whitney satisfies the requirements of Section 510(b)(5) of [SMCRA] and is, therefore, entitled to a coal land exchange." C.A. App. 6424; *see also* C.A. App. 1006 at

[1] The Claims Court found, and the Court of Appeals agreed, that this value was $60 million, based on the fair market value on August 3, 1977. App. 49a-69a, 19a-21a. In reaching that figure, the Claims Court substantially reduced the value respondents' experts assigned to the Whitney coal in August 1977; indeed, that court rejected the testimony of both sides' experts and made its own finding about the amount of coal a willing buyer in that year would have assumed he could produce and sell from the property.

¶ 36. Discussions began between respondents and BLM officials, focusing on a compensatory tract of federal coal known as Ash Creek, *see* 47 Fed. Reg. 9294 (Mar. 4, 1982), and involving substantial exploratory drilling on that tract at respondents' expense. App. 27a.

A year later respondents were forced to obtain yet another determination by DEQ. On September 20, 1982, BLM's local District Manager sent respondents a letter stating that, contrary to DEQ's determination, he found that East Whitney contained only 322 acres of AVF. He also refused to process the exchange application further until respondents applied for and received a formal determination by DEQ concerning the presence of an alluvial valley floor on West Whitney. C.A. App. 2624-2625. Respondents immediately protested the District Manager's decision to BLM's State Director. C.A. App. 2626. They also filed a second application with DEQ in February 1983. Pls. Ex. 14; C.A. App. 2639. In May 1983, DEQ finally issued its unavoidable determination that indeed *both* tracts in fact contained large areas of AVF significant to farming. C.A. App. 6590 (851 acres within the East Whitney permit area, 516 acres within the West Whitney permit area); *see also* C.A. App. 1008 at ¶¶ 48, 49. "Therefore," DEQ stated, "a permit to mine coal within the alluvial valley floor . . . cannot be approved . . . ." C.A. App. 6530.[2] DEQ also found that "the many pieces of the original mining unit that are left after this decision" could not be mined alone. C.A. App. 6590.

On the basis of these findings, BLM's State Director remanded respondents' protest to the District Manager, who in June 1983 confirmed what the lower courts later determined to have been obvious all along: the effect of SMCRA's AVF prohibition was to render respondents'

---

[2] Because denial of permission to mine was in substance a prerequisite to DEQ's determination, the government agrees that "DEQ concluded that a permit could not be granted to mine within the AVF." Pet. 7.

coal unminable and respondents therefore "qualif[ied] for a coal exchange for their entire holdings." C.A. App. 2724. Respondents then immediately resumed discussions with BLM officials about the compensatory federal coal to be considered in exchange for the Whitney coal. Tr. 306.

In August 1983, with the exchange process having then consumed six full years since SMCRA had effectively precluded all mining of their coal, respondents were forced to file this action in the United States Claims Court in order to protect their right to some form of compensation. *See* 28 U.S.C. 2501 (six-year statute of limitations).[3] Respondents nevertheless continued to press BLM to provide federal coal, and those efforts continued during the litigation before the lower courts.

In fact, by May 1984, while respondents were conducting substantial drilling to determine the amount of coal in the federal Ash Creek tract, discussions with BLM had slowed to the point that respondents were forced to file a second lawsuit, this time in federal district court in Wyoming, in order to compel progress toward an exchange. That court granted respondents summary judgment, concluding that Interior had "unreasonably delayed and failed to perform" the statutory exchange. App. 28a; *see* Pls. Ex. 24, *Whitney Benefits, Inc.* v. *Hodel*, No. C84-193K, Findings of Fact and Conclusions of Law at 8 (D. Wyo. May 23, 1985). The district court further ordered Interior to tender coal equal in value to respondents' coal, and Interior responded with a "Notice of Compliance" in August 1985, refusing to conduct an exchange because, it

[3] The Claims Court initially dismissed the action on the ground that respondents were required to exhaust the compensation process under SMCRA's exchange provision before receiving compensation under the Tucker Act, 28 U.S.C. 1491. The Federal Circuit reinstated the complaint in January 1985, however, holding that the SMCRA exchange remedy is "a means of settling the just compensation claim," App. 82a, and construing the exchange and Tucker Act remedies as parallel avenues for compensating owners of AVF coal. *See* p. 18, *infra*.

said, respondents' coal no longer had any value in the depressed coal market of 1985. App. 28a.

Respondents then went back to the district court, and in December 1985 it *again* ordered Interior to tender coal. *Id.*, C.A. App. 2745. A month later, Interior published in the Federal Register a notice of its intention to comply with the December 1985 order by tendering some undetermined portion of the Ash Creek tract in exchange for respondents' coal. C.A. App. 2744-2745. Interior's notice attracted the attention of the firm that owned the surface over the Ash Creek coal, which indicated its interest in leasing that federal coal. Accordingly, on April 9, 1986, under compulsion of the district court and pressured by the upcoming Claims Court trial, Interior filed a second "Notice of Compliance" notifying respondents that it was then tendering some or all of the federal coal "beneath a [new] tract of land known as the Hidden Water Tract." Defendant's Memorandum of Contentions of Facts and Law (April 11, 1986), Appendix 1. Simultaneously, Interior moved to compel respondents to tender a deed to their coal to the government. Plaintiffs' Post-Trial Brief (June 3, 1986), Appendix at 1-105 to 1-110.

During the Claims Court trial, the government contended that its "tender" of the Hidden Water coal represented just compensation under the Fifth Amendment. But Interior's own documents showed that the Hidden Water coal was worthless, Pls. Exs. 22, 23 at 11-12, Tr. 518-524, 530-531, and BLM's Wyoming State Director testified that the government had performed no evaluation whatever of Hidden Water, and he was unable to assign any value to that property compared to that of the Whitney coal when its development was precluded in 1977. Tr. 484, 503, 513-514.

After trial, Interior filed an "Amended Notice of Compliance" withdrawing its tender of Hidden Water and

shifting back to Ash Creek again.[4] Plaintiffs' Supplemental Post-Trial Memorandum (Aug. 7, 1986), Appendix at Tab 1. As the government concedes, however, Interior's own report on the value of the Ash Creek tract ultimately showed that that coal had essentially no value in the depressed market conditions prevailing when it was offered—a decade after SMCRA precluded mining the Whitney coal. Pet. 9.

In summary, the lengthy administrative proceedings were fully exhausted in this case. The clear result of those proceedings was (1) to confirm the lower courts' findings that no permit to mine respondents' property could ever have been granted and (2) to offer respondents essentially nothing in "exchange" for the total deprivation of their property.

REASONS FOR DENYING THE WRIT

The judgment in this case rests on a straightforward application of this Court's established date-of-taking decisions to the special facts found by the lower courts. In addition, because of the unusual facts found by the lower courts, the result reached below is of extremely limited

[4] The government asserts that respondents "rejected" Hidden Water. Pet. 9 n.8. In fact, respondents have made clear that they would accept compensation in coal under SMCRA or cash under the Tucker Act or a combination thereof, but that they could not agree to deed away their coal in exchange for coal worth far less than their own on the date mining was precluded. Plaintiffs' Supplemental Post-Trial Memorandum (Aug. 7, 1986) at 4-5, 9-10. Far from rejecting coal tendered in exchange, respondents have stated their willingness to accept such coal, subject to their right to be fully compensated by receiving additional compensation before deeding their coal to the government. However, the government has declined to transfer federal coal to respondents on that basis. *Id.*; Plaintiffs' Response to Defendant's Notice of Additional Authority re Ash Creek (April 15, 1987), Attachment 2; Defendants' Notice of Additional Authority (Aug. 14, 1987), Attachment. Transcript of July 23, 1987 hearing in *Whitney Benefits, Inc.* v. *Hodel*, No. C84-193K (D. Wyo.) at 66-68.

application, and certainly does not authorize the "circumvention" of administrative processes asserted by the government. Finally, the government's claim of "windfall" and its invocation of "fairness and justice" are both based on the government's continuing refusal to accept the lower courts' two key *factual* findings in this case: (1) that the necessary and practical impact of the enactment of SMCRA's AVF prohibition on these respondents' particular property was to destroy totally the value of that property; and (2) that the value of that property at that time was $60 million. The Court should not grant certiorari to review those dispositive findings. Nor should it permit the government, having unreasonably delayed the administrative process for years, to now come before this Court under the banner of "fairness and justice" asking to profit from that delay through a declaration that respondents' property is now valueless. The petition should be denied.

1. The Decision Below Is in Accord With This Court's Decisions.

a. The government labels the lower courts' decisions "unprecedented" and claims they threaten "regulatory chaos" because, according to the government, they "excuse" parties from "presenting the matter to the agency in the first instance," Pet. 17, and permit administrative proceedings to be "bypassed altogether." Pet. 16, 20. In fact, however, the lower courts' decisions did no such thing.

Indeed, the question whether parties can "bypass" administrative procedures is not presented at all in this case. Here, even though everyone knew the outcome in advance, respondents did "present the matter" to DEQ; DEQ did make its decision confirming that the Whitney coal had been rendered unminable because of SMCRA's AVF prohibition; and even the government does not contend that any further administrative action was required to make DEQ's decision "final." The only issue here is

whether *after* DEQ's processes had ended and the case was ripe for adjudication, the Claims Court and Federal Circuit properly analyzed the *date* of the taking by focusing on the actual effect of SMCRA's AVF prohibition on the Whitney coal during the period before the agency at last acted. The lower courts' analysis of that issue was completely in accord with this Court's decisions.

This Court has long recognized that property is "taken" when governmental action has the actual, practical effect of denying an owner all "economically viable" use of his property. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987); *Kirby Forest Industries* v. *United States*, 467 U.S. 1, 14 (1984); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 138 n.36 (1978). The Court has furthermore made clear that the date when such a denial in substance occurs may not in fact coincide with the date the government formally declares a taking or, as here, with the date the agency formally determines that no permit can be granted.

Thus, in *Kirby Forest*, the property owner argued that the government effectively took his property before it was formally condemned, because governmental actions before that time had already completely deprived the owner of its use. Specifically, Kirby contended that the government's previous filing of a condemnation complaint and notice of *lis pendens* in itself effectively precluded Kirby from using its property thereafter. That would indeed make for a taking, this Court unanimously recognized. The Court concluded, however, that Kirby had failed to prove its contention factually: "[W]e do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to rise to a taking under this inverse condemnation theory. * * * Indeed, [Kirby] [was] unable to point to any statutory provision that would have authorized

the Government to restrict petitioner's usage of the property prior to payment of the award." *Id.* at 14-15.

Here, respondents not only showed that SMCRA required such a restriction, but also proved at trial that the immediate practical effect of that statute on their property was to preclude all economically viable "usage of the property" from the day SMCRA became law. The government has offered this Court no ground for rejecting the lower courts' key findings on this issue. Indeed, as the Court of Appeals noted, "the government does not suggest, and did not suggest at trial, *any basis whatever* on which a permit could legally be granted to surface mine Whitney coal." App. 4a (emphasis supplied).

Nevertheless, the government offers two arguments designed to avoid the lower courts' critical findings. First, the government belatedly speculates that regulators might have determined that mining would have affected only "undeveloped range lands" or would have had only a "negligible impact" on farming. Pet. 18. The government similarly hypothesizes that maybe an agency might have found some independent reason for denying respondents the right to mine their coal. Pet. 19. These possibilities might exist in some other case, but in this case both lower courts found that no such possibility existed as to *this* property. Indeed, the government did not contend at trial that either of the statutory exclusions was applicable. And when DEQ did make its decision in this case, it simply confirmed what both lower courts later found to have been obvious upon enactment—that neither of the exclusions applied and, given the clear applicability of the statute, no permit could ever have been granted.

Second, the government asserts that despite *Kirby Forest* a taking under a statute that "incorporat[es] a permit requirement" can *never* occur before an agency denies a permit. Pet. 14-15. And that formalistic principle applies, according to the government, even where, as here, a property owner proves both that the statute's substantive prohibition clearly and absolutely precluded

development of its property and that no subsequent administrative proceeding could possibly have altered the total economic deprivation already brought about by the statute itself. Pet. 16.

The government's approach is both illogical and inconsistent with this Court's precedents. Indeed, the government concedes that SMCRA would have effected a taking on enactment if it had said, "No surface mining shall be conducted on the tracts known as East Whitney and West Whitney." Pet. 20. Nevertheless, under the government's rule espoused here, no taking would be effected if the same substantive prohibition were expressed in terms of a permit process: "No *permit* shall be granted to surface mine the tracts known as East Whitney and West Whitney." This absolutist position is just as untenable as the one the government advanced and this Court rejected in *Kirby Forest*. For just as actions by the government before formal condemnation can so interfere with property's use as to effect a taking, so too can actions by the government before formal denial of a permit.

In arguing to the contrary, the government relies on this Court's cases that emphasize the need, in the ordinary case, for final agency action to occur before a court may determine whether a taking has occurred. Pet. 14-20 (citing *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*; and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)). But those cases are not pertinent here: in *this* case, the matter *was* presented to the appropriate agency and it *did* take action before the judicial taking determination. Furthermore, none of the government's cited cases departs from the date-of-taking standard in *Kirby Forest*, for none of them remotely suggests that after the agency acts, the lower courts are somehow disabled from looking at a statute's practical impact on an

owner's property during the years before the agency's inevitable, formal decision was issued.[5]

Moreover, this application of *Kirby Forest* certainly does not risk "regulatory chaos," as the government claims, because it in no way authorizes parties to "bypass" administrative processes. Whatever the requirement for agency action, it was fully met in this case when respondents "presented the matter" to DEQ and DEQ decided it on the very basis the Claims Court later found to have been self-evident in 1977—the obvious application of the statute to respondents' property. In these circumstances, the lower courts simply recognized that no matter what formal administrative steps parties must complete after the fact, the Fifth Amendment requires that they must be compensated according to the value of their property at the time it was effectively taken from them, not at some later time when an agency confirms the obvious. This was plainly required under *Kirby Forest*, and the lower courts correctly applied that decision to

---

[5] Thus, in *Hamilton Bank*, the Court based its holding that more agency processes were required before a taking could be recognized on the fact that "[i]t appears that variances could have been granted" by either the local planning commission or a zoning board permitting continued profitable use of the property. 473 U.S. at 188. Similarly, in *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340 (1986), all nine Justices agreed that the date of taking must await further agency action if there remains "the possibility that some development will be permitted." 477 U.S. at 352; *see id.* at 359 (requirement satisfied when it is clear "that all development will be barred") (White, J., dissenting). *See also Riverside*, 474 U.S. at 127 (regulatory scheme implemented by permit requirement does not effect a taking because "the very essence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired"). Here, both lower courts found as fact that on the day SMCRA was enacted there was no possibility that "permission" could ever have been "granted" to make economically viable use of respondents' property. Accordingly, if the government's cited cases are relevant at all, they support respondents' position that on the particular facts of this case, the lower courts properly found that the taking occurred upon enactment of SMCRA's AVF prohibition.

the facts of this case. Further review by this Court is not warranted.[6]

b. The government next challenges the lower courts' determination that the taking occurred on enactment by relying on the statute's exchange provision to contend (1) that some "value" necessarily remained in the Whitney property on that day, and (2) that respondents have no ripe Tucker Act claim because the exchange process has not been exhausted. Neither contention is correct and neither warrants review.

First, the fact that Congress included a possible means to *compensate* AVF coal owners cannot possibly affect the date their property was previously *taken* by a complete preclusion of the property's use. As this Court held in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), while it is true that " 'no constitutional violation occurs until just compensation has been denied,' nevertheless the interference that effects a taking might begin much earlier, and compensation is measured from that time." 482 U.S. at 320 n.10 (quoting *Hamilton Bank*, 473 U.S. at 194 n.13).

---

[6] The government also relies on *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*. But in *Hodel*, this Court held merely that takings claims turn essentially on "ad hoc, factual inquiries" requiring the application of a statute "to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." 452 U.S. at 295. Therefore, the Court concluded, a "facial challenge" to SMCRA that did not demonstrate "application of the Act to particular surface mining operations or its effect on specific parcels of land" was simply "not ripe for judicial resolution." *Id.* at 295, 297. However, the Court added, "this holding does not preclude . . . coal mine operators from attempting to show that as applied to particular parcels of land, the Act . . . effect[s] a taking." *Id.* at 297 n.40. That is the precise showing respondents made in this case. Thus, not only did respondents go to every administrative effort called for by this Court's agency action cases, but they also completely satisfied *Hodel*'s requirement of proof about the actual impact of the statute as it applied to their "particular" parcel of property. App. 12a.

Here, as both lower courts found as fact, the "interference that effect[ed] a taking" occurred on August 3, 1977. Accordingly, as this Court recognized in *First English*, the taking occurred on that date, without regard to the existence of compensation mechanisms like the exchange provision or the Tucker Act.

In its attempt to meld the statutory taking in this case with the possibility of subsequent compensation under the exchange provision, the government cites *Penn Central*, *supra*, and contends that because SMCRA offered the possibility of providing respondents at least something of value in exchange for their property, that possibility in itself precluded any taking from occurring at all. That is not what *Penn Central* held. In *Penn Central*, the only restriction placed on the property at issue (Grand Central Terminal) precluded construction of a new 50-story office building above the Terminal. It was conceded that this did not interfere with Penn Central's continued primary use of the property, and that it could continue to profit and earn a "reasonable return" on Grand Central. The Court also relied on the fact that some other use of the airspace above the terminal might have been permitted. For those reasons, and because any restrictions on construction rights would be ameliorated by Penn Central's ability to transfer any "development-rights" lost at Grand Central to other Penn Central buildings, the Court concluded there was no taking. 438 U.S. at 129, 136, 137, 138 n.36.

The government now contends that the transferable "development rights" in *Penn Central* are like the coal-exchange "right" here, and, accordingly, that the result here "cannot be squared with *Penn Central*." Pet. 22. But the *Penn Central* Court itself expressly contradicted this contention, stating that its holding was based on Penn Central's "present ability to use the Terminal for its intended purpose and in a gainful fashion." 438 U.S. at 138 n.36. Here, by contrast, both courts below found

as fact that the value of the Whitney property did not merely decline because of SMCRA's restriction on its use; that value was completely destroyed by a statute that precluded *all use* of the coal.[7]

In these circumstances, *Penn Central* plainly cannot be relied on for the proposition that the mere possibility of some compensation being received at some later date through the coal-exchange process precluded a taking from occurring in 1977, the date when *use* of the property was as a factual matter totally precluded.[8] Rather, as this Court later held in *First English*, "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321.

Moreover, the government's confusion of compensation with taking, if accepted, would lead to absurd results. For

[7] Despite the findings of the lower courts that SMCRA precluded all economically viable use of the Whitney property, the government now claims that "just as the ordinance in *Penn Central* did not interfere with any existing use of the Terminal, so here SMCRA did not interfere with any existing use of the Whitney tracts." Pet. 22-23. Instead, the government reasons, just as Penn Central sought to engage in a "new use" by exploiting "additional rights" in their property (the air rights), SMCRA interfered with a "new use" of the Whitney coal—mining it. This is surely not a serious contention. *Penn Central* had a usable, profitable terminal before the regulation and still had one after it; respondents had usable, profitable coal before SMCRA's prohibition and had none at all after it.

[8] Even if the government's unprecedented reading of *Penn Central* were correct, the government has not begun to show that the Whitney property actually had any value for exchange purposes. Indeed, as the Court of Appeals noted, the government presented no evidence at trial of any possibility that the property could have been sold for anything on that basis. App. 13a. Instead, the government relies on the mere existence of the exchange provision as the basis for its claimed "value." Respondents, on the other hand, showed that the property proffered by the government in the exchange process was worthless. *See* pp. 7-8, *supra*.

example, if the government were correct, the mere existence of the state inverse condemnation remedy available in *Hamilton Bank* would have delayed the taking itself until that remedy failed, for until then the property could be said to retain "value" as the basis for compensation. Or, in the federal context, if the government were correct, the very existence of the Tucker Act would mean that no action by the United States could ever effect a taking, because the property rendered useless would always retain "value" as the basis for a Tucker Act claim. Worse, under this theory, the government could prohibit all economically viable use of property and then, by offering to "exchange," say, 25 cents on the dollar in substitute property or cash, claim there was no taking in the first place because the property owner never lost all economic use of his property.

None of this is sustainable under this Court's decisions for the simple reason that the Fifth Amendment's guarantee of just compensation—"a full and perfect equivalent of the property taken"[9]—cannot be circumvented simply by simultaneously offering something of value to the property owner in exchange for his "taken" property.

The government's other exchange-based argument is equally without merit and appears to be only an afterthought. Relying on *Hamilton Bank* and *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), the government contends that "even if the coal-exchange mechanism would not altogether eliminate the possibility of a taking," its existence precludes a Tucker Act cause of action until the Claims Court can determine "whether the substitute rights offered or accepted . . . represented fair and adequate compensation for any taking that might be found." Pet. 23, 25. Thus, the government apparently claims that, even now, respondents' Tucker Act claim is still not ripe for adjudication.

---

[9] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974) (quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1983)).

But this ripeness contention is not even fairly included in the government's Question Presented; that Question concerns solely whether (and when) a taking occurred, not the propriety of a Tucker Act remedy after such a taking in fact occurred. Moreover, the Court of Appeals' determination that the coal-exchange mechanism need not be exhausted prior to a Tucker Act suit was the subject of its *1985* judgment, which the government did not petition to the Court. Subsequently, in reliance on that decision, the parties conducted substantial discussions involving exchanges, and the lower courts spent considerable resources resolving the fact issues relevant to the parallel Tucker Act remedy. In view of that reliance, it is inappropriate for the government to challenge this 1985 decision now, rather than six years ago.

In any case, on the present facts the government is wrong in contending that *Monsanto* or *Hamilton Bank* precludes this Tucker Act suit. The reason the Court required Monsanto to "exhaust" the arbitration mechanism provided for in the statute at issue there was a very practical one: on the record before it, the Court could not "preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation, thus nullifying any claim against the Government for a taking . . . ." 467 U.S. at 1013 n.16. Similarly, in *Hamilton Bank* the Court held that where a state provides an "adequate procedure for seeking just compensation," a Section 1983 suit should not be entertained "until the State fails to provide adequate compensation . . . ." 473 U.S. at 195.

In this case, these purposes were plainly met because, as previously demonstrated, the record shows beyond fair debate that respondents fully exhausted the coal exchange process, and the result was first a denial of any compensation and then, under court order, an offer to re-

spondents of essentially nothing for their loss.[10] Therefore, if ever an administrative compensation scheme was "exhausted," it was this one. And if ever such a scheme was shown completely insufficient to provide the *full* compensation contemplated by *Monsanto* and *Hamilton Bank*, it was this one. The government's argument to the contrary is completely without substance.

c. The government's final attack on the lower court's decision in this case is that the Court of Appeals violated *Keystone* by treating the character of the government's action as "wholly irrelevant." Pet. 25. But the Court of Appeals did take this factor into account, and weighed it strictly in accordance with this Court's decisions. Specifically, both the Claims Court and the Court of Appeals expressly considered the important public purpose of SMCRA and weighed it against the total destruction of respondents' property in this case. App. 18a-19a, 45a-46a, 72a. Furthermore, that is the precise kind of weighing this Court employed in the cases cited by the government—*Keystone* and *Hodel* v. *Irving*, 481 U.S. 704 (1987).

In *Keystone*, the Court identified "the two factors" that "have become integral parts" of its taking analysis: "land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or denies an owner economically viable use of his land.*'" *Keystone*, 480 U.S. at 485 (emphasis supplied) (quoting

[10] Although the government's exhaustion argument does not address the facts about the exchange process in this case, Pet. 23-25, its Statement does mention that after trying twice to order Interior to tender coal, the district court stayed judicial proceedings in August 1987 pending the outcome of the Tucker Act suit. Pet. 9. The government seems to imply that this stay stopped the exchange process in its tracks. What actually stopped was the drumbeat of court orders necessary at every turn to force movement by Interior. Interior remained perfectly free to continue discussions if it had any valuable offers to make, regardless of the status of the lawsuit respondents brought to compel Interior to do so.

Agins v. *Tiburon*, 447 U.S. 255, 260 (1980). Because the regulation in *Keystone* furthered a public interest in "preventing activities similar to public nuisances," 480 U.S. at 492, *and* because the property owners had "failed to make a showing of diminution of value sufficient to satisfy [the Court's] test in . . . regulatory takings cases," [11] the Court held that these two key factors *together* precluded a taking. In *Irving*, by contrast, the Court analyzed the "character of the Government's regulation" as being "extraordinary" in that it did not merely diminish, but "completely abolished" the property owner's right. 481 U.S. at 716, 717. Such a "*total* abrogation," the Court reasoned, "cannot be upheld." *Id.* at 717 (emphasis in original). This was simply a restatement of the same principle earlier recognized in *Keystone*: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .'" 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295-296, and *Agins*, 447 U.S. at 260).

In this case, the lower courts' explicit factual findings make unassailable that respondents' property has been totally destroyed. It is therefore hard to understand how the government can fault the lower courts' weighing of the key "takings" factors or how it can contend that that weighing departs from *Keystone*, *Irving*, or this Court's other decisions.

The government further overlooks another key factor deemed important by this Court and weighed by the Court of Appeals here in assessing "the character of the government's action"—the particular "type of taking" involved. This Court made plain in *Keystone* that it is often "critical" whether the taking involves an actual invasion or acquisition of property as opposed to mere "land use regulation." 480 U.S. at 488-489 n.18. Here, the Court of Appeals noted, this case is not one of "mere"

---

[11] *Id.* at 492-493. In *Keystone*, only some 2% of the property's value was restricted. 480 U.S. at 496. Here, *all* value was destroyed.

regulation; rather this is a case in which "the statutory words" themselves state Congress' express intention to "*acquire* private fee coal precluded from being mined by the restrictions of [this statute] . . . ." App. 14a (emphasis by Court of Appeals) (citing 30 U.S.C. 1260 (b)(5)); *see also* 123 Cong. Rec. 15,755 (1977).

Finally, the government in any event does not contend that "the character of the government's action" factor should have been sufficient to preclude a taking in *this case*. Instead, the government says only that "[i]n applying a statute with multiple purposes, such as this one, it *may be* necessary to assess whether a particular regulatory action is so directly related to the protection of public health, safety or property, as to be analogous to the abatement of a nuisance." Pet. 26 (emphasis supplied). But the government does not relate that general theme to this case,[12] involving total destruction of respondents'

---

[12] Nor could it. In Congress' eyes, surface mining in AVFs was clearly not like the infectious trees that had to be destroyed in *Miller* v. *Schoene*, 276 U.S. 272 (1928), or the illegal use of breweries that had to be stopped in *Mugler* v. *Kansas*, 123 U.S. 623 (1887). To the contrary, when it enacted SMCRA, Congress included a grandfather provision that allowed *every surface mine* that was operating on an alluvial valley floor in the year prior to August 3, 1977 to continue mining. Thus, Congress expressly permitted existing AVF mines to continue to "interrupt, discontinue or preclude farming on alluvial valley floors . . . significant to farming," 30 U.S.C. 1260(b)(5), subject to compliance with SMCRA's performance standards. As the Court of Appeals noted, this congressional determination is "hardly the action of one out to abate a 'nuisance' or anything 'injurious to the health, morals, or safety of the community.'" App. 18a (quoting *Keystone*, 480 U.S. at 489). Indeed, the Claims Court found, and the Court of Appeals agreed, that, but for the AVF prohibition, respondents could have mined their coal both profitably and in full compliance with all other provisions of SMCRA, including SMCRA's environmental protection performance standards relating to preservation of the essential hydrologic functions of the AVF. App. 18a. *See* 30 U.S.C. 1265 (a)(10); H.R. Rep. No. 128, 95th Cong., 1st Sess. 118 (1977) ("it is possible to mine on [alluvial] valley floors and still be able to assure maintenance of the hydrologic functions of the area").

property.[13] The government's "nuisance" remarks, therefore, should in no event be treated as grounds for certiorari in this case.

2. The Decision Below Is of Extremely Limited Application.

As we have shown, the lower courts have made and balanced the appropriate "ad hoc" findings in accord with this Court's decisions. Moreover, and equally important, the findings and circumstances of this case are so unusual and the burden of proof imposed on these respondents so formidable, it is difficult to imagine other cases in which property owners could likewise successfully demonstrate a taking upon enactment of a statute.

Here, in order to prevail below, these respondents had to prove to the satisfaction of both lower courts that (1) as a factual matter the statute's descriptive prohibition unquestionably applied to their particular property; (2) the statute's application was so obvious and the prohibition on use so total that it completely deprived them of all economic value in their property as of the date of the enactment; (3) the statutory prohibition as it applied to respondents' property was furthermore so clear that no administrative agency would have had any authority whatever to grant respondents any permit in any way altering their prior total economic deprivation; (4) respondents' exhaustion of the "foredoomed" DEQ process confirmed this inevitable fact; and (5) respondents' subsequent exhaustion of the exchange process, coupled with the government's "unreasonable" delay of that process,

[13] With the exception of extraordinary cases like *United States* v. *Caltex*, 344 U.S. 149 (1952) (wartime demolition of petroleum facility to prevent it from falling into hands of advancing enemy), this Court has never held that a person whose property is completely destroyed loses his Fifth Amendment right to compensation due to the "character" of the governmental action. The government has not—and cannot—contend that this case is even remotely analogous to *Caltex*.

demonstrated that it would not provide respondents *any* significant compensation, much less the just compensation to which they are entitled under the Fifth Amendment. Based on these facts, and in accordance with this Court's decisions, the lower courts properly entertained this suit, found a taking upon enactment, and valued the property as of that date.

Thus, contrary to the government's suggestions regarding the "far-reaching" importance of this case, respondents did not "circumvent" the administrative process and "go directly to court" with their taking claims. Instead, they pursued that process for six years before at last suing under the Tucker Act. And they brought suit under the Tucker Act only *after* the relevant agency had at long last concluded that a permit could not be granted to mine their property. Only then did the Claims Court make its findings concerning the question that has to be answered by a court in *every* takings case: when as a factual matter did the government's actions effectively deprive the owner of all economically viable use of his property?

In the ordinary case, that deprivation will be no sooner than the date any permit or variance process is completed, because in the ordinary case that process will present some possibility that the owner will be permitted to make economically viable use of his property.[14] But there may be that rare case—and respondents have proved that this is such a case—where given the clarity of the statutory prohibition and its obvious application to a particular piece of property, no permit could possibly be granted to make economically viable use of the property. Where that rare case is presented, the courts should—indeed, under *Kirby Forest* they must—recognize that as a factual matter the complete economic deprivation had

---

[14] *See* note 5, *supra*.

effectively occurred before the subsequently completed administrative process finally confirmed it.[15]

Finally, the government professes alarm that this decision was by the Circuit with jurisdiction over takings claims against the United States. But in a long line of cases, including this one, the Federal Circuit and its prececessor, the Court of Claims, have shown their complete understanding of the need for regulated parties to procure agency action before coming to court claiming a taking. Where owners have failed to seek available remedies, these courts have consistently remanded them to the relevant agency first. *E.g.*, *Otter Creek Coal Co.* v. *United States*, 224 Ct. Cl. 697 (1980); *Burlington Northern Railroad Co.* v. *United States*, 752 F.2d 627 (Fed. Cir. 1985). And where permission to use property remained possible, the Circuit has made clear that the taking does not occur until the agency decides the matter. *E.g.*, *Florida Rock Industries* v. *United States*, 791 F.2d 893 Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). There was no departure from these doctrines here. In this case, respondents had procured the necessary agency action and the only issue was the date of the taking, which the Circuit properly analyzed based on SMCRA's actual effect on the particular property involved in this case. Despite the government's extravagant claims, therefore,

---

[15] The government expresses concern that this "taking upon enactment" decision will induce many property owners affected by land use statutes to file protective Tucker Act suits within six years of enactment, lest their rights be barred. Pet. 27-28. In the first place, it is difficult to see how *this* decision creates such an inducement. Presumably, any owner whose property is in fact taken by a statute would wish to file such a protective suit with or without the present decision, just as these respondents did. Moreover, the proposition that this decision *requires* the filing of such a suit confuses the date of taking with the date when the taking claim is ripe for judicial review. Obviously, the statute of limitations runs from the latter date, not the former one. Yet the present decision does not raise a ripeness question at all, only the date of taking.

nothing in this case circumvents or threatens any regulatory processes either under SMCRA or otherwise.[16]

3. The Decision Below Is Fair and Just.

The government contends that the decision in this case has "greatly unsettled" the "overarching" principle that governs application of the Just Compensation Clause—"fairness and justice." Pet. 28 (citing *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Just the opposite is true: it is the government's conduct and theories that threaten to "unsettle" the law of takings and to deprive these respondents indefinitely of the "fairness and justice" guaranteed by the Just Compensation Clause.

This Court is committed to the view that "[a] property owner is not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a] determination" concerning the taking of his property. *County of Yolo*, 477 U.S. at 350 n.7; *id.* at 363 (White, J., dissenting). The Court is also committed to the view that

---

[16] Neither does this case raise any important issue regarding a court's reliance on legislative history. The government contends that mere statements by "a single Member of Congress" should not effectively be allowed standing alone to "'take' property on behalf of the United States . . . ." Pet. 21. But the Court of Appeals' judgment rests squarely on its factual determination that an express prohibition in the statutory language of SMCRA was "precisely descriptive of the Whitney coal estate." App. 4a (citing 30 U.S.C. 1260(b)(5)(A)). That determination in turn rested on respondents' proof at trial that the statutory prohibition "applied to the property because of obvious physical facts about the property." App. 8a. It furthermore rested on the government's own concession in the Federal Register that development of the Whitney coal had been halted "by the passage of [SMCRA]." App. 7a. Accordingly, as the Court of Appeals stated, "the government knew SMCRA applied on enactment to Whitney coal. [Respondents] knew SMCRA applied; and any prospective buyer would know it applied." App. 8a. *These* are the underpinnings for the Court of Appeals' judgment. It thereafter recited the legislative history because that history "confirmed" Congress' awareness that the express statutory language would in fact apply to the Whitney coal. App. 8a-10a.

it will not redetermine factual findings concurred in by a trial court and court of appeals.[17] As shown, respondents in this case patiently and diligently resorted to every procedure and every court available to them—including a separate suit to force the government to act. The ultimate result was explicit findings by both courts below that it is now *14 years* since respondents were completely deprived of property with a fair market value of $60 million. It is submitted that this should at long last have been the end of the matter.

It is only because the government will not accept those findings—and wishes to relitigate them—that it now labels them a "windfall."[18] Pet. 14. It is only because the government insists that a taking can *never* factually occur prior to formal, confirmatory administrative action that it still disputes the date of the taking. And it is only because the government claims the power to end-run the Just Compensation Clause altogether—by the simple device of offering some future "exchange" value at the time it acquires property—that it now asserts that no taking occurred here at all.

None of these assertions merits this Court's attention. None of them is consistent with the Court's precedents. And none of them is commensurate with the "fairness

---

[17] *See, e.g., Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984); *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

[18] For example, the government attempts to support its "windfall" contention by rearguing a factual issue it litigated and lost before both lower courts—that Kiewit's 1976 and 1978 permit applications indicated that respondents intended only "limited" development of their property. Pet. 18-19, 27. At trial, however, Kiewit's Vice President was called as a witness by the government and explained Kiewit's decision, consistent with the custom in the industry, to seek a permit for immediate needs and to expand the permitted quantities thereafter. Tr. 764; *see* Tr. 227.

and justice" the government purports to espouse. Rather, as the Court of Appeals concluded, the government has "on appeal carried its attempt to deny the impact of SMCRA on Whitney coal to unreasonable lengths in an apparent hope of postponing the day of reckoning into eternity." App. 7a. The government should not be permitted to postpone respondents' just compensation any longer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. MILLER
Counsel of Record
WALTER A. SMITH, JR.
JONATHAN L. ABRAM
CHARLES J. FELKER
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202)-637-6575
Counsel for Respondents

August 30, 1991

No. 91-195

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

WHITNEY BENEFITS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-195

UNITED STATES OF AMERICA, PETITIONER

v.

WHITNEY BENEFITS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

We have demonstrated in the petition that the court of appeals fundamentally distorted regulatory takings jurisprudence in holding that the Whitney coal was taken upon enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* First, the finding of a taking at a time when respondents had not even applied for a permit squarely conflicts with *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Pet. 14-20. Second, it improperly elevates snippets of legislative history to the status of a "legislative taking" and confuses an assertion of regulatory jurisdiction with a statutory exercise of the power of eminent domain. Pet. 20-22. Third, the notion that the mere enactment of SMCRA destroyed all economic value of the Whitney coal is refuted by SMCRA'S simultaneous furnishing of a right to exchange coal underlying an alluvial valley floor (AVF) for federal coal of equal value and by respondents' own efforts to obtain such an exchange, and it is inconsistent

with the holding in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), that the ability to transfer development rights must be considered as mitigating the economic impact of regulation. Pet. 22-25. Fourth, the decision below improperly disregards SMCRA's important purpose of protecting the sensitive hydrology of AVFs while at the same time *preserving* the full economic value of AVF coal. Pet. 25-26.

Respondents for the most part either ignore these points or try to divert attention from them. But they cannot obscure that the decision of the Federal Circuit—which is binding precedent for all regulatory takings claims against the United States—unsettles controlling Fifth Amendment principles and broadly threatens the orderly administration of numerous regulatory programs. Review therefore is warranted.

1. Respondents attempt (Br. in Opp. 9-14) in two ways to avoid this Court's holdings that under a federal regulatory statute—specifically including SMCRA (*Riverside Bayview Homes*, 474 U.S. at 126-127, citing *Virginia Surface Mining*, 452 U.S. at 293-297)—no taking can occur unless and until the owner has applied for a permit to develop its property in a specified manner and the agency has definitively refused to issue one.

a. Respondents first argue (Br. in Opp. 1-3, 9, 11-12, 23-24) that a property owner is excused from applying for a permit if the court entertaining the taking claim finds it "obvious" that the agency would have been required to deny the application. This argument fails even on its own terms, because, contrary to respondents' assertion (Br. in Opp. 2, 3, 11, 13, 22), the Claims Court made no factual finding that it was "obvious" in 1977 that a permit could not be granted to mine any of the Whitney coal. Instead, the Claims Court relied solely on the legislative history of SMCRA, which, in its view, showed that Congress *intended* to prohibit all mining of Whitney coal. Pet. App. 46a-49a, 72a. Respondents have now abandoned any defense of that rationale for finding a "legislative taking" (see Br. in Opp. 25 n.16), and we have

in any event shown it to be indefensible as a matter of both statutory interpretation and Fifth Amendment doctrine. Pet. App. 20-22.[1]

The court of appeals did express the view that a permit application "was obviously and absolutely foredoomed on the day SMCRA was enacted." Pet. App. 5a. But it, too, relied largely on the legislative history. See *id.* at 8a-10a. The only evidence concerning the Whitney tracts that the court of appeals cited was developed at the trial of this case, long after SMCRA was enacted, see *id.* at 7a-8a, and scarcely proves that it was obvious in 1977 that DEQ would have been required to deny a permit to mine any Whitney coal. To the contrary, when respondents requested DEQ to make an AVF determination for the Whitney tracts six years later, they submitted (and DEQ reviewed) extensive data regarding the acreage that "potentially" or "probably" qualified as an AVF and the effect that mining would have on agricultural activities. See DX 23, App. D11; DX 24, 26. Even then, DEQ did *not* find that SMCRA barred mining of all Whitney coal; DEQ found only that a substantial portion of that coal underlies an AVF, and it recommended that the Bureau of Land Management (BLM) approve an exchange for all Whitney coal only because it would be impracticable to mine the remainder. Pet. 7. In short, it was far from obvious when SMCRA was enacted how its AVF provisions would be applied to the Whitney tracts.

Aside from the absence of record support for respondents' position, this Court's decisions contradict any suggestion that a court may excuse a person from seeking a permit under a regulatory statute based on the court's own belief that it would have been futile to do so. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). As the

---

[1] Contrary to respondents' contention (Br. in Opp. 20-21), the statutory authorization (30 U.S.C. 1260(b)(5)) for the Secretary to "acquire" AVF coal through the coal-exchange mechanism after enactment of SMCRA (and upon request of the owner) is inconsistent with the notion that such coal had *already* been acquired by the United States when SMCRA was passed.

Court explained in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190-191 (1985), the rule that no taking can occur unless a permit is denied "is compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors relevant to the taking inquiry "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.[2] That rule also properly reflects the separation of powers under the Constitution. Here, Congress has assigned to an administrative agency the responsibility for applying the general terms of SMCRA to particular tracts on a case-by-case basis. Until the owner has filed for and been denied a permit, the necessary predicate for a compensable taking—action by the only governmental entity that is authorized by SMCRA to "take" property—is wholly lacking. The Federal Circuit, however, has now held that the lower federal courts, which have *not* been authorized by Congress to take property, may nevertheless effectively do so by adjudicating in the first instance how a regulatory scheme applies to particular property and then finding a taking on the basis of that adjudication.

Moreover, as we have explained (Pet. 2, 16), SMCRA provides that *no one* may engage in surface mining without a permit. 30 U.S.C. 1256(a). Respondents make no effort to rebut our analysis (Pet. 16) that unless and until they applied for and were denied a permit, it was this requirement of general applicability, not the AVF restrictions on granting a permit, that barred the mining

---

[2] The discussion of futility in *Williamson County*, 473 U.S. at 188, and *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 352, 359 (1986), upon which respondents rely (Br. in Opp. 13 n.5), concerned the distinct question of whether a landowner, having once sought and been denied a permit to develop its property, must submit a revised request. Those cases do not suggest that a taking might be found at a time when the landowner had not submitted any permit application.

of Whitney coal and that therefore was the proximate cause of any "injury" they sustained when SMCRA was enacted. Respondents do not contend—and the courts below did not hold—that this general requirement constituted a taking, since it serves the distinct purpose of preserving the integrity of the regulatory scheme. In fact, this Court has already held that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking," and that "[a] requirement that a person obtain a permit before engaging in certain use of his or her property does not itself 'take' the property in any sense." *Riverside Bayview Homes*, 474 U.S. at 126, 127.[3]

b. There likewise is no merit to respondents' alternative contention (Br. in Opp. 1, 9-10, 11, 12-13, 22) that they satisfied the "final decision" requirement of *Williamson County*, *Riverside Bayview Homes* and *Virginia Surface Mining* by requesting and obtaining a determination from DEQ about the extent of the AVF and the effect of mining on agricultural production.[4] Respondents did not request and receive the AVF determination until 1983 (in order to satisfy the statutory prerequisite for a coal exchange), yet they insist that the Whitney coal was taken when SMCRA was passed in 1977. Thus, respondents apparently regard a final administrative decision as a mere *procedural* prerequisite to filing a claim for compensation under the Tucker Act. Cf. *Stevens* v. *Department of Treasury*, 111 S. Ct. 1562 (1991). Con-

---

[3] Despite respondents' efforts to portray the decision below as carving out only a narrow exception to this rule, it will almost always be possible (as this case well illustrates) to contend that it was obvious from the outset that the statute required denial of a permit. The decision below therefore invites widespread circumvention of the administrative process.

[4] DEQ considered only the physical characteristics of the Whitney tracts, not an actual application for a permit to mine (see DX 23, at 2 (C.A. App. 6435)); DEQ might well have denied such a permit, in whole or in part, for reasons other than (or in addition to) SMCRA's AVF restrictions.

trary to respondents' view, however, the denial of a permit is a *substantive* prerequisite to the very existence of a taking; indeed, it *is* the taking (if there is a taking at all) under a federal regulatory statute.

2. Respondents contend (Br. in Opp. 10-11, 12-13, 23-24) that *Kirby Forest Industries* v. *United States*, 467 U.S. 1 (1984), allowed the courts below to select a date of taking prior to the denial of a permit. This contention cannot be squared with *Virginia Surface Mining* and *Riverside Bayview Homes*, which were decided before and after *Kirby Forest*, respectively, or with *Danforth* v. *United States*, 308 U.S. 271 (1939), which was cited with approval in *Kirby Forest*, 467 U.S. at 11-12 & n.17, 15. As we have explained (Pet. 17), and as respondents do not deny, *Danforth* specifically rejected the contention that the mere enactment of a statute providing for implementing action by Executive officials constituted a taking of property. 308 U.S. at 286.

Moreover, in *Kirby Forest* itself, the Court held that a taking did *not* occur prior to the usual time (payment of compensation) under the method of taking there involved (straight condemnation). Respondents rely (Br. in Opp. 10-11) on the Court's statement that there was no interference with the owner's property severe enough to amount to a taking because the government was not authorized to restrict its use prior to paying compensation. 467 U.S. at 14-15. Respondents contend that in this case, SMCRA's AVF provisions did restrict the use of their property and did deprive them of all economic value immediately upon enactment. But as we have explained, it was the general prohibition against mining without a permit (which respondents do not challenge), not the AVF restrictions, that barred mining of Whitney coal upon enactment of SMCRA. Moreover, even if the AVF restrictions had been applied to the Whitney tracts at that time, they would have preserved the full economic value of any AVF coal the tracts contained. See pages

7-10, *infra*. Like the property owners in *Kirby Forest*, 467 U.S. at 15, if respondents did not want to realize that value themselves, they could have sold their property for its fair market value.

3. The illogic and unfairness of respondents' position are made manifest by their response to our submission that the Court should grant review to prevent the uncertainty and disruption that will ensue as a result of the six-year statute of limitations on Tucker Act claims under 28 U.S.C. 2501. As we have explained (Pet. 27-28), under the holding below that a taking occurred upon enactment of SMCRA in 1977, similarly situated owners of AVF coal would now be time-barred from seeking compensation, and property owners will find it necessary in the future to file taking claims soon after a regulatory measure is enacted, even if they have no current plans to develop their property. Respondents do not deny that such consequences weigh strongly in favor of certiorari. But in a creative attempt to avoid review, they suggest (Br. in Opp. 24 n.15) that even where a taking allegedly occurred upon enactment of a regulatory measure, the statute of limitations should not begin to run until a permit is denied. Respondents and those similarly situated cannot have it both ways. Under 28 U.S.C. 2501, a suit must be filed within six years of when the claim "first accrues," which in this setting is when the taking occurs. In respondents' view, a taking occurred here when SMCRA was enacted, which no doubt explains why they filed this suit exactly six years later. By contrast, under respondents' new position, a property owner could wait for decades after enactment of a regulatory statute to apply for a permit, and then if it is denied, seek compensation plus interest from the date the statute was passed. That rule would invite sandbagging of the government and resultant distortion in the regulatory process.

4. Respondents continue to insist (Br. in Opp. 14-19) that the Whitney coal retained no economic value after

enactment of SMCRA. But as we have shown (Pet. 22), the very same paragraph of SMCRA that restricts mining in an AVF affords a person who is unable to mine by virtue of those restrictions a right to exchange his AVF coal for federal coal of equal value. 30 U.S.C. 1260 (b)(5). This guarantee not only refutes as a matter of law respondents' contention that the mere enactment of SMCRA effected a taking (see Pet. 23 n.21); it also conforms to the very measure of just compensation that respondents invoke: "a full and perfect equivalent for the property taken." Br. in Opp. 17 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150 (1974)).

Respondents' detailed discussion (Br. in Opp. 4-8, 16 n.8, 18-19) of the subsequent unfolding of the coal-exchange process is legally irrelevant to their contention that the Whitney coal was taken in 1977. Despite the court of appeals' invitation on the first appeal (Pet. App. 83a-84a), respondents never amended their complaint to allege a taking at a later time, such as whenever they claim to have abandoned faith in the coal-exchange process; and respondents in fact have not abandoned that process, since they have refused to either accept or reject BLM's outstanding offer of the Ash Creek tract. Pet. 9.

At bottom, respondents' dissatisfaction with the coal-exchange process to date stems from their desire to shift to the government the consequences of what they concede (Br. in Opp. 8) to have been a significant decline in the coal market since SMCRA was passed in 1977. Respondents contend (Br. in Opp. 8 n.4) that they are entitled to receive a quantity of coal whose total value *today* equals that of the Whitney coal *in 1977*. The result would be to require BLM to convey to respondents a quantity of federal coal far in excess of the quantity of Whitney coal they could reasonably expect to mine. That is, to put it mildly, an odd view of an equal exchange, and BLM has refused to accede to it. But BLM *does* stand ready to enter into a fair exchange by conveying coal that is equal in quantity and quality to the Whitney coal.

Surely no more is required to negate the claim that SMCRA has resulted in a taking of respondents' property.

By contrast, respondents would receive a windfall under their position that there was a taking of all Whitney coal in 1977 and that they now are entitled to receive (in cash or coal) the $140 million that represents the full value of all Whitney coal as of 1977, plus interest. Respondents concededly had no plans in 1977 to engage in the extensive mining described in the hypothetical, litigation-generated plan on which the courts below predicated their finding of a taking; to the contrary, they had withdrawn their 1976 application for a permit for far more modest mining on East Whitney alone. Nor did respondents thereafter seek a permit to mine Whitney coal as provided in the hypothetical plan, which contemplated an unprecedented diversion of the Tongue River. Pet. 5-6, 9 n.10, 11 n.12. The judgment below therefore does not rest on respondents' "reasonable investment backed expectations." *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987).[5] Respondents' failure to realize whatever additional value the Whitney coal might have had in 1977

---

[5] Contrary to respondents' contention (Br. in Opp. 26 n.18) that our claim of a "windfall" depends on a factual issue that we lost in both lower courts, neither court addressed whether respondents ever expected to mine Whitney coal to the extent the courts hypothesized. See Pet. 11 n.12. In fact, ignoring the test in this Court's regulatory takings decisions, the court of appeals did not address respondents' investment-backed expectations at all. Respondents cite (Br. in Opp. 26 n.18) testimony by PKS's vice president that it was industry practice for an operator to apply for a permit to meet present needs and then seek an amendment if it has entered into additional supply contracts. Tr. 764. But the same witness testified that PKS had no firm plans in 1977 to mine Whitney coal to the extent contemplated by the hypothetical Boyd Plan or to conduct any mining at all on West Whitney. Tr. 759-760. Moreover, in answers to interrogatories in connection with its 1976 permit application, PKS represented that it did not have "any plans, proposals, or intention of expanding the proposed Whitney Mine beyond the size stated" in its application. DX 13, at 54.

is attributable to their own delay in developing that coal and the ensuing decline in the coal market, not SMCRA's AVF provisions.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45076